133

(1)

Supreme Court, U.S.
FILED
MAY 20 2009
OFFICE OF THE CLERK

No. 09-92

In the

Supreme Court of the United States

Jeffrey and Laura Davis,
Petitioners.

v.

Commissioner of Internal Revenue,
Respondent.

Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

Robert Alan Jones,
R.A.J. Limited, P.C.
1061 E. Flamingo Road,
Suite 7
Las Vegas, NV 89119
(702) 791-3403

Petitioner, and
Attorney for Petitioners

QUESTIONS PRESENTED

I. Whether the United States Tax Court and the United States Sixth Circuit Court of Appeals denied Mr. Jeffrey Davis procedural due process by considering matters outside of the record in reviewing the Tax Court petition filed by Mr. Robert Alan Jones on the Davis' behalf?

II. Whether the United States Tax Court and the United States Circuit Court of Appeals mistakenly ruled that Mrs. Laura Davis' claim of expiration of the assessment statute of limitations in the collection due process hearing went to the "underlying liability," rather than was an appealable procedural defect?

III. Whether Mrs. Laura Davis' claim of "innocent spouse" over which the United States Tax Court had original jurisdiction was properly the subject of a petition in the Tax Court when denied by the CDPH settlement officer, and if so whether that permitted a joint petition with her husband to the Tax Court under the provisions of 26 U.S.C. §6330?

LIST OF PARTIES

All parties do not appear in the caption of the case on the title page. Counsel for Petitioners, Robert Alan Jones although not an original petitioner in the Tax Court, is also a Petitioner in the instant case due to the sanctions imposed upon him.

RULE 29.6

All petitioners, pursuant to Rule 29.6, state that they are unaffiliated with any public company and/or public stock.

TABLE OF CONTENTS

Page

Questions Presented i

List of Parties ii

Rule 29.6 iii

Table of Authorities vi

Opinions Below 1

Statement of Jurisdiction 2

Relevant Provisions Involved 2

Statement of Facts 4

Reasons for Granting the Petition 9

Conclusion 19

Appendix* - *in alphabetical order

Sixth Circuit Court Order (11/14/2008) A-1

Sixth Circuit Court Order Denying Petition for Rehearing en banc (2/19/2009) A-11

Tax Court Decision Doc. Docket No. 144-05L (2/28/2006) A-13

Tax Court Decision Doc.
Docket No. 145-05L (2/28/2006) A-15

Tax Court Decision Doc.
Docket No. 146-05L (2/28/2006) A-19

Tax Court Decision Doc.
Docket No. 147-05L (2/28/2006) A-24

Tax Court Decision Doc.
Docket No. 149-05L (2/28/2006) A-29

Tax Court Memorandum Opinion
T.C. Memo 2007-201 (7/24/2007) A-34

Tax Court Order
(consolidated) (2/28/2006) A-76

Tax Court Orders(7/25/2007) A-78

Tax Court Order and Decisions (7/27/07) A-88

Transcript Excerpts (2/28/2006) A-98

TABLE OF AUTHORITIES

Page

Cases

Blocker v. Commissioner,
T.C. Memo. 2005-279 . . . . . 16, 17

Burnet v. Sanford & Brooks Co.,
282 U.S. 359, 363 (1931) 13

Commissioner v. Keystone Consolidated Industries, Inc., 508 U.S. 152, 1159 (1993) . 15

Commissioner v. Lester,
366 U.S. 299, 304 (1961) 15

Commissioner v. Lundy,
516 U.S. 235, 249-250 (1996) 15

Eby v. Internal Revenue Service, 2006 U.S. Dist. LEXIS 14590 (S.D. Ohio 2006) 16

Edelson v. Commissioner, 829 F.2d 828, 834
(9th Cir. 1987) 14

Erlenbaugh v. United States,
409 U.S. 239, 244 (1972) 15

Estate of Wenner v. C.I.R., 116 T.C. 284, 286, U.S.T.C. 2001 . . . . . 18, 19

Florida Power & Light Co. v. Lorion,
470 U.S. 729, 744 (1985) 11

Goldston v. United States, 104 F.3d 1198,
1199-1201 (10th Cir. 1997) 14, 15

Hoffman v. Commissioner,
119 T.C. 140 (2002) 16

Jensen v. Commissioner,
T.C. Memo. 2004-120 ..... 16, 17

Kindred v. Commissioner, 454 F.3d, 688, 694
(7th Cir. 2006) 12, 16

Marvel v. United States, 719 F.2d 1507, 1514
(10th Cir. 1983) 14

Mlay v. Internal Revenue Service, 168F.Supp.2d
781, 786-787 (U.S.D.C. S.D. OH 2004) 19

Pomerantz v. Commissioner,
T.C. Memo. 2005-295 16

Robinette v. Commissioner, 439 F.3d 455
(8th Cir. 2006), rev'ing
123 T.C. 85 (2004) 9, 10, 16

Sorenson v. Secretary of the Treasury,
475 U.S. 851, 860 (1986) 15

United States v. Dale, 782 F. Supp. 615, 624
(D.D.C. 1991) 14

United States v. Dixieline Financial, Inc.,
594 F.2d 1311, 1312 (9th Cir. 1979) 14

United States v. Latham,
754 F.2d 747, 750 (7th Cir. 1985) 14

United States v. Regan, 713 F. Supp. 629, 633
(S.D.N.Y. 1989) 14

Statutes

26 U.S.C. §6013(e) 19
26 U.S.C. §6015(b)(1)(E) 19
26 U.S.C. §6015(e) 18
26 U.S.C. §6320 ..... 3, 10, 17
26 U.S.C. §6321-6327 17
26 U.S.C. §6330 ..... 2, 10, 15, 17
26 U.S.C. §6330(c)(2)(A) 17
26 U.S.C. §6330(c)(2)(B) 13, 16
26 U.S.C. §6501(a) 14, 15, 16
26 U.S.C. §6673(a)(1) 5
28 U.S.C. §1254(1) 2

Other Authorities

Administrative Procedures Act (APA) 10, 11, 20

IRS Restructuring and Reform Act of 1998,
Pub. L. 105-206, 112 Stat. 685 15

United States Constitution, Amendment V 2, 11

Webster's II New College Dictionary 16

In the

Supreme Court of the United States

Jeffrey and Laura Davis,
Petitioners.

v.

Commissioner of Internal Revenue,
Respondent.

Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners, Robert Alan Jones, and Mr. and Mrs. Davis respectfully pray that a writ of certiorari is issued to review the decision of the Sixth Circuit Court of Appeals entered November 14, 2008.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 301 Fed.Appx. 398 (C.A. 6). The opinion of the United States Tax Court is reported at T.C. Memo. 2007-201.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Sixth Circuit affirming the decision of the United States Tax Court was handed down on November 14, 2008. Its Order Denying the Petition for Rehearing *en banc* was issued on February 19, 2009.This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

RELEVANT PROVISIONS INVOLVED

United States Constitution, Amendment V

"No person shall be held... nor be deprived of life, liberty, or property, without due process of law."

Internal Revenue Code, 26 U.S.C. §6330

(a) Requirement of notice before levy.--

> **(1) In general.**– No levy may be made on any property or right to property of any person unless the Secretary has notified such person in writing of their right to a hearing under this section before such levy is made. Such notice shall be required only once for the taxable period to which the unpaid tax specified in paragraph (3)(A) relates.
>
> **(3) Information included with notice.**– The notice required under paragraph (1) shall

include in simple and nontechnical terms–

(A) the amount of unpaid tax;

(B) the right of the person to request a hearing during the 30-day period under paragraph (2);

(b) Right to a fair hearing.--

(2) One hearing per period.–A person shall be entitled to only one hearing under this section with respect to the taxable period to which the unpaid tax specified in subsection (a)(3)(A) relates.

(3) Impartial officer.–The hearing under this subsection shall be conducted by an officer or employee who has had no prior involvement with respect to the unpaid tax specified in subsection (a)(3)(A) before the first hearing under this section or section 6320. A taxpayer may waive the requirement of this paragraph.

(c) Matters considered at hearing.–In the case of any hearing conducted under this section–

(1) Requirement of investigation.–The appeals officer shall at the hearing obtain verification from the Secretary that the requirements of any applicable law or administrative procedure have been met.

(2) Issues at hearing.--

(A) In general.–The person may raise at the hearing any relevant issue relating to the unpaid tax or the proposed levy, including–

(i) appropriate spousal defenses;
(ii) challenges to the appropriateness of collection actions; and
(iii) offers of collection alternatives, which may include the posting of a bond, the substitution of other assets, an installment agreement, or an offer-in-compromise.

(B) Underlying liability.–The person may also raise at the hearing challenges to the existence or amount of the underlying tax liability for any tax period if the person did not receive any statutory notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability.

STATEMENT OF FACTS

Jeffrey and Laura Davis underpaid their joint federal income taxes in 1997, 1998, and 1999 by diverting their income through a business trust. The trust also underpaid its taxes in 1999. Upon

discovering the underpayments, the Internal Revenue Service sent statutory notices of deficiency to both the Davises and the trust. These notices provided the Davises with an opportunity to challenge the alleged deficiencies in the United States Tax Court.

Jeffrey Davis, but not Laura, filed a challenge with respect to the 1997 and 1998 deficiencies. The issuance of the statutory notice and the filing of the petition by Jeffrey Davis had the effect of tolling the statute of limitations for assessment of the tax against him for the period from the issuance of the notice to a date one hundred and fifty (150) days subsequent to the final decision of the Tax Court. This did not occur for some two and one half years.

However, Mrs. Laura Davis did not petition the Tax Court and as a result, the statute of limitations for assessment of the 1997 and 1998 taxes against her was tolled only for the period of the ninety day letter, plus sixty days necessary thereafter to enter an assessment against her. In effect the expiration of the statute of limitations against Laura Davis was not extended for the period of time her husband's case was being processed in the Tax Court.

Jeffrey Davis on the other hand, after petitioning the Tax Court, and following his attorney's withdrawal from the case, failed to prosecute his petition or to answer the Commissioner's discovery requests. After some two years, a default was entered against him.

In that previous case the Tax Court upheld the IRS's determination and also imposed a $25,000 penalty on Davis pursuant to 26 U.S.C. §6673(a)(1) for instituting or maintaining the case primarily for delay. (That is not the sanction at issue here.) Davis did not appeal, and a personal tax assessment was entered against him, and one against his wife at approximately the same time. The assessments were for all three tax years and included the business trust.

The Davises did not pay the assessments. As a result, the IRS sent them a "Final Notice - Notice of Intent to Levy and Notice of Your Right to a Hearing," for each tax deficiency. In response, the Davises retained Jones as their attorney, and requested a Collection Due Process (CDP) hearing. They alleged the existence of "impermissible whipsaws," and claimed that Laura Davis was "an 'innocent spouse.'"

The IRS Settlement Officer for the case, Michael Freitag, set the CDP hearing date for July 19, 2004. At Jones's request, Freitag postponed the hearing until August 24, 2004. Jones failed to appear on that date. The hearing was eventually held by telephone on September 7, 2004.

At the hearing, Freitag found that, by statute, the Davises and the trust could not contest their underlying tax liability because each had received a notice of deficiency and because the Tax Court had already determined that Jeffrey Davis was liable for payments in tax years 1997 and 1998. What he failed to consider even though it was pointed out in the

hearing request is that the statute of limitations against Mrs. Davis had expired by almost two years (because it was not tolled by an intervening tax court petition).

Although Freitag also noted that he could not consider any collection alternatives because the Davises had not presented any, he did not consider that the tax imposed upon the trust, and separately upon both the husband and the wife amounted to multiple taxes on the same income. Freitag issued notices of determination sustaining the government's filings and all proposed tax levies.

The Davises then filed petitions for review of that ruling in the Tax Court. Finally, they claimed that the assessments violated the statute of limitations, and that Laura Davis was an "innocent spouse."

At the hearing on February 28, 2006 before the Tax Court, the Court set out its position with regard to sanctions against Petitioners and/or their counsel:

> THE COURT: I would just clarify one more time that the Court's focus is on the language of the petition, the language of the amended petition, the language of the objection and the merit of the claims made therein and whether those claims have merit or are groundless or were groundless or were instituted solely for delay. The Court is not concerned with anything beyond the specific claims made (See Tr. 15, lines 17-23; Appendix: A-69).

The Court did not follow its own ruling at the trial disposition hearing (See 1&2 transcript excerpts A-68-69), but rather improperly relied upon dubious discovery in Mr. Davis' previous Tax Court case (See T.C. Memo 2007-201, p. 5 at footnote 2; A-29).

> In support of our order and decision, we **relied on** the following **deemed admissions** (paragraph number and ellipses omitted) (Emphasis added.):
>
> Petitioner Jeffrey W. Davis created a series of sham trusts designed to assist him in evading the payment of his Federal income and employment taxes.
>
> Petitioner Jeffrey W. Davis created the JLD Asset Management Trust to avoid paying his Federal taxes.
>
> The JLD Asset Management Trust is a sham trust.
>
> The Davis Charitable Trust is a sham trust.
>
> The petitioner Jeffrey W. Davis instituted this case to delay the assessment of his individual income taxes for the taxable years 1997 and 1998.
>
> The petitioner Jeffrey W. Davis instituted this case to use the Tax Court

as a forum to present frivolous constitutional and procedural arguments against the United States' Federal income tax system.

The petitioner Jeffrey W. Davis fired his attorney, Scott W. Gross, after Mr. Gross refused to file frivolous motions in connection with this case.

The petitioner Jeffrey Davis intentionally, recklessly and negligently disregarded the Federal tax laws in the preparation of his 1997 and 1998 Federal income tax returns.

(A-29).

REASONS FOR GRANTING THE PETITION

I. The United States Tax Court and the United States Sixth Circuit Court of Appeals denied Mr. Jeffrey Davis procedural due process by considering matters outside of the record in reviewing the Tax Court petition filed by Mr. Robert Alan Jones on the Davis' behalf.

After stating twice on the record that the Davises and their counsel would be held responsible **only** for the documents filed in the Tax Court in these specific docket numbers, the Tax Court acting directly

contrary to the holding in *Robinette v. Commissioner*, 439 F.3d 455 (8th Cir. 2006), rev'ing 123 T.C. 85 (2004) stepped outside of the administrative record to impose sanctions.

The Tax Court specifically referring to a previous tax court case involving Petitioner Jeffrey Davis identified him as a "tax protestor," and made specific reference to proceedings outside of both the administrative record, and the previous record for the Tax Court. The Sixth Circuit Court of Appeals then compounded that mistake with its opening remarks below: "Jeffrey and Laura Davis... are, or at least were, tax protestors."

In *Robinette, supra* the Eighth Circuit held that judicial review of nonliability issues under section 6330(d) is limited to the administrative record. Petitioners respectfully urge the Court to follow the Eighth Circuit's decision in *Robinette* in all cases arising under sections 6320 and 6330, including this case.

Petitioner's position here is that the Court is bound by both the general principles of administrative law as well as the judicial review provisions of the APA in reviewing a notice of determination. Petitioner's position is that when reviewing for abuse of discretion, the Tax Court is limited to the administrative record, and it was procedural constitutional error for the Courts to label Mr. and Mrs. Davis tax protestors based on matters totally outside the record while they were attempting to settle all of their cases within the

"system."

If the administrative record does not support the determination, then "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985).

The administrative record in this case, however completely discloses all of the factors that the settlement officer considered in making his determination. Nevertheless the Trial Court went outside of the administrative record in considering Mr. Davis' prior activities and reached the prejudicial conclusion he was a "tax protestor." This deprived him of due process under the Administrative Procedures Act (APA) and the Fifth Amendment to the United States Constitution.

II. The United States Tax Court and the United States Circuit Court of Appeals mistakenly ruled that Mrs. Laura Davis' claim of expiration of the assessment statute of limitations in the collection due process hearing went to the "underlying liability."

The Petitioners raised the issue of the expiration of the assessment statute of limitations as a procedural defense to the validity of assessments against both Mr. and Mrs. Davis. The defense was raised at the collection due process hearing and disposed of by the settlement officer improperly because he ruled that

inasmuch as petitioners had received a notice of deficiency from that point on a challenge to the statute of limitations is a challenge to underlying liability. This is clearly correct only in the United States **Seventh** Circuit Court of Appeals. (See *Kindred v. Commissioner*, 454 F.3d, 688, 694 (7th Cir. 2006).)

As explained *infra* the expiration of the assessment statute of limitations as to Laura Davis occurred after she decided not to petition the Tax Court for 1997 and 1998. Because she was never before the Tax Court, the issuance of a notice of deficiency to her could never have resulted in a determination of underlying liability on the merits.

The statutory notice sent to her tolled the three year statute of limitations for the 90 days set out in the letter plus an additional 60 days the IRS is allowed for processing her default decision not to petition the Tax Court. Thereafter, the normal statutory period expires in accordance with provisions of law and IRS regulations.

As a result, the IRS failure to assess Mrs. Davis for almost two years following her decision not to file a Petition in the Tax Court resulted in a time barred assessment as to her for the 1997 and 1998 tax years.

When Mr. and Mrs. Davis jointly requested a collection due process hearing, she thus had a defense to the collection of assessed taxes that may not have been available to him. This defense was in addition to and separate from her claim of "innocent spouse," and

their joint claim of double taxation or "whipsaws." The settlement officer abused his discretion in failing to entertain this claim.

Thereafter, appeal of the whipsaws, innocent spouse, and expiration of assessment statute of limitations claims for both spouses was required in order to affect a settlement. And that settlement was reached in the Tax Court case below by trading Mrs. Davis' claims for a reduction of liability of all claims of the Davis family from almost $1,700,000. to slightly over $400,000.

With respect to the issues pertinent to the 1997 and 1998 taxable years, the settlement officer's determination on the statute of limitations for assessment of Mrs. Davis' tax liability is also subject to abuse-of-discretion review, because a procedural attack on the SOL is not an attack on the underlying liability according to the IRS or most Circuits.

The term "underlying tax liability appears in section 6330(c)(2)(B), which permits taxpayers to challenge their underlying tax liability unless they have received a notice of deficiency or otherwise had an opportunity to dispute the liability. 26 U.S.C. §6330(c)(2)(B). **"Underlying tax liability" as used in section 6330(c)(2)(B) does not encompass challenges to the procedures leading to the assessment of a liability.**

Although the term "liability" is not explicitly defined in the Internal Revenue Code, it is well settled

that the existence of a liability is distinct from the act of assessment. The Internal Revenue Code imposes income tax liability based on an annual accounting period. *Burnet v. Sanford & Brooks Co.*, 282 U.S. 359, 363 (1931) (tax liability is based on the net result of all transactions occurring during a fixed accounting period); *Edelson v. Commissioner*, 829 F.2d 828, 834 (9th Cir. 1987) ("[T]ax liabilities, though unassessed, are deemed obligations due and owing at the close of the taxable year."). Moreover, the accrual of an income tax liability is not dependent on the Service sending a notice of deficiency. *United States v. Dale*, 782 F. Supp. 615, 624 (D.D.C. 1991); *United States v. Regan*, 713 F. Supp. 629, 633 (S.D.N.Y. 1989). Nor is the accrual of a tax liability dependent on the Service making an assessment. *Goldston v. United States*, 104 F.3d 1198, 1199-1200 (10th Cir. 1997) (tax liability arises from statutory duty to pay tax, not assessment of liability); *United States v. Latham*, 754 F.2d 747, 750 (7th Cir. 1985) (assessment is an administrative determination that is not a prerequisite to tax liability); (See also *Marvel v. United States,* 719 F.2d 1507, 1514 (10th Cir. 1983) ("[T]here is no requirement in the Internal Revenue Code that before liability for employment taxes accrues, a notice of deficiency or assessment be given."). The assessment of tax is "the ascertainment of the amount due and the formal entry of that amount" on the government's books. *United States v. Dixieline Financial, Inc.*, 594 F.2d 1311, 1312 (9th Cir. 1979).

Liability and assessment are regularly distinguished throughout the Internal Revenue Code. For example, even without any assessment of a tax

liability, the United States may bring suit against any party liable for the tax to reduce the unassessed liability to judgment. Section 6501(a) of the Code makes this clear by specifying that "no proceeding in court *without assessment*" for the collection of any tax "shall be begun after the expiration of" three years from the date the applicable tax return was filed. 26 U.S.C. §6501(a). Under this statute, a collection suit may be begun either with or "without assessment" prior to the expiration of the three-year period. *Goldston v. United States*, 104 F.3d 1198, 1201 (10th Cir. 1997) (even in the "absence of assessment" the government "may still file a civil action" or "a proof of claim in a bankruptcy proceeding" to collect the tax during this initial three-year period).

It was against this statutory backdrop that Congress enacted **§6330** as part of the IRS Restructuring and Reform Act of 1998, Pub. L. 105-206, 112 Stat. 685. When Congress enacts a new statutory provision, it is presumed to be aware of all previous statutory provisions covering the same subject. *Commissioner v. Keystone Consolidated Industries, Inc.*, 508 U.S. 152, 1159 (1993); *Erlenbaugh v. United States*, 409 U.S. 239, 244 (1972). As a result, identical terms used in different provisions of the Internal Revenue Code are presumed to have the same meaning. *Commissioner v. Lundy*, 516 U.S. 235, 249-250 (1996); *Sorenson v. Secretary of the Treasury*, 475 U.S. 851, 860 (1986). Further, the " 'Code must be given as great an internal symmetry and consistency as its words permits.'" *Commissioner v. Keystone Consolidated Industries, Inc.*, 508 U.S. 152, 1159

(1993), *quoting Commissioner v. Lester*, 366 U.S. 299, 304 (1961) (internal quotation marks omitted).

Consistent with the interpretation of liability and assessment in other Internal Revenue Code sections, the interpretation of "tax liability" as used in section 6330(c)(2)(B) should limit the term to mean the amount owed under the Internal Revenue Code, and exclude from the definition the assessment of the liability and the procedural correctness of the assessment. Congress's inclusion of the word "underlying" reinforces this narrow interpretation. "Underlying" means basic or fundamental (Webster's II New College Dictionary), and its inclusion as a modifier of tax liability signifies Congressional intent that only the essential nature of the liability be an issue in the CDP hearing process. The essential nature of a tax liability does not include the assessment process.[1]

1· "Underlying tax liability" has been interpreted by the Tax Court to include "the tax on which the Commissioner based his assessment." *Robinette v. Commissioner*, 123 T.C. 85, 93 (2004), rev'd, 439 F.3d 455 (8th Cir. 2006). However, the Tax Court has also characterized this term, without analysis, to include the expiration of statutes of limitations. See *Hoffman v. Commissioner*, 119 T.C. 140 (2002) (claim that assessment statute of limitations expired is a liability challenge subject to de novo review); *Pomerantz v. Commissioner*, T.C. Memo. 2005-295 (same); *Jensen v. Commissioner*, T.C. Memo. 2004-120.. The Seventh Circuit Court of Appeals in *Kindred v. Commissioner*, 454 F.3d 688 (7th Cir. 2006), has relied upon these Tax Court decisions without analysis and has held that a challenge to the statute of limitations for making an assessment under section 6501 constitutes a challenge to the underlying liability. But see *Eby v. Internal Revenue Service*, 2006 U.S. Dist. LEXIS 14590

The very structure of §6330 further reinforces the distinction between liability and assessment. The permissibility of challenges to "the existence or amount of the underlying tax liability" is listed in §6330(c)(2)(A)) permitting the taxpayer to raise any relevant issue relating to the "unpaid tax.'" The "underlying tax liability" refers to the amount of tax a taxpayer is liable for under the Internal Revenue Code. "Unpaid tax" refers to the amount of the underlying tax liability not paid by the taxpayer that the IRS can collect administratively. To collect administratively, the tax liability must be assessed. 26 U.S.C. §§6321-6327, 6331-6344. The amount of the unpaid tax includes the validity of the assessment, the expiration of statutes of limitations, application of payments and credits, and bankruptcy discharge.

Therefore, in summary, there is a distinct division of authority as to whether for purposes of Collection Due Process Hearings (I.R.C. §§6320, and 6330) "underlying authority" includes the issue of expiration of the statute of limitations for assessment of federal taxes. This should be decided in favor of the Petitioners, because it was the essence of their appeal from the letter of determination issued by the

---

(S.D. Ohio 2006) (determination regarding expiration of collection statute of limitations is subject to abuse of discretion review). See also *Blocker v. Commissioner*, T.C. Memo. 2005-279 (challenge to validity of notice of deficiency is a challenge to underlying liability). For the reasons described in the text, the holding of these decisions, *Hoffman*, *Pomerantz*, *Jensen*, and *Blocker*, should not be followed here.

settlement officer, and was also the basis for negotiating settlement in the Tax Court. This demonstrates that the appeal to Tax Court and the petition could not be considered frivolous.

III. Mrs. Laura Davis' claim of "innocent spouse" over which the United States Tax Court had original jurisdiction was properly the subject of a petition in the Tax Court when denied by the CDPH settlement officer.

Mrs. Davis did not petition the Tax Court with respect to 1997 and 1998 deficiencies. Therefore, even if she timely received a statutory Notice of Deficiency any default against her could not be considered a decision on the merits under any circumstances. She had not waived her innocent spouse defenses.

This issue was timely raised in her request for a Collection Due Process hearing with respect to 1997 and 1998: docket #149-05L, and for 1999: docket #144-05L. Although she did not submit an innocent spouse application on the IRS Form, her request was denied. She is entitled to appeal that request to the Tax Court which by statute and case law has original jurisdiction over this issue. See IRC §6015(e), *Estate of Wenner v. C.I.R.*, 116 T.C. 284, 286, U.S.T.C. 2001:

> There are two primary jurisdictional predicates for this Court to review a claim for relief from joint and

> several liability. . . . The second jurisdictional predicate is found in section 6015(e). This section enables an electing spouse to petition for review of an administrative determination (or failure to make a determination) regarding relief from liability as a stand alone matter, independent of any deficiency proceeding.

Further, raising the issue of innocent spouse precluded summary judgment on that issue because the resolution is dependant on issues of material fact, and because it is remedial in nature, it is to be construed and applied liberally in favor of the person claiming its benefits. (See IRC §§6015(b)(1)(E), 6013(e), and *Mlay v. Internal Revenue Service*, 168F.Supp.2d 781, 786-787 (U.S.D.C. S.D. OH 2004).)

Therefore, the ruling of the Tax Court, at that of the Sixth Circuit Court of Appeals that Mrs. Davis cannot raise the innocent spouse issue in a petition from the collection due process hearing determination is wrong as a matter of law. The *Wenner* court held correctly that because the innocent spouse is entitled to petition the Tax Court directly as to her status, then an appeal from notice of determination merely supplants an original petition and actually saves the Court time, and is more efficient by combining more than one issue into a single litigation.

CONCLUSION

In summary there are three very important

federal questions wrapped into one issue which should be decided by this Honorable Court. The Tax Court and the United States Court of Appeals separated the actions of Laura Davis, and her husband Jeffrey Davis in appealing and held that because it did not agree that Jeffrey Davis had valid appellate arguments, and therefore he had no right to appeal. Further because he had no right to appeal both he and his attorney, Robert Alan Jones (also the attorney in the Tax Court for Laura Davis), were subject to sanctions. Laura Davis was not sanctioned.

In this process, the Tax Court went outside of the administrative record to a previous Tax Court case. It used unanswered discovery questions posed by government counsel to Jeffrey Davis when he was not represented by counsel to establish that he was a "tax protestor." This violated both the APA and Mr. Davis' rights to procedural due process.

The Tax Court in essence held that the petition of behalf of Laura Davis was not frivolous; therefore she was not subject to sanctions. However, the same petition and amended petition on behalf of Jeffrey Davis was frivolous; therefore, both he and his attorney were subject to sanctions.

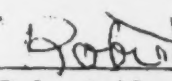
The problem with this finding is that in the absence of filing a petition on behalf of both husband and wife, a settlement could not be reached because her issues and arguments were the stronger of the two. In effect, a favorable settlement to all parties was reached based on her arguments causing the Tax Court

to vacate its previous order of summary judgment with respect to many issues.

As a final result the Sixth Circuit in an unpublished opinion (A-1) upheld the actions of the Tax Court while ignoring established law as to the administrative procedures, the assessment statute of limitations, and innocent spouse.

Based on the foregoing, Petitioners Jeffrey and Laura Davis, and their counsel, Robert Alan Jones, respectfully request this Honorable Court grant their Petition for a Writ of Certiorari to the Sixth Circuit Court of Appeals.

Respectfully submitted,



Robert Alan Jones, DC Bar#87502
R.A.J. Limited, P.C.
1061 E. Flamingo Road, Suite 7
Las Vegas, NV 89119
Phone: 702-791-3403

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 07-2388

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LAURA DAVIS, et al.,	)	**FILED NOV 14 2008**
	)	**Leonard Green, Clerk**
Appellants,	)	
	)	
v.	)	ON APPEAL FROM
	)	FROM THE UNITED
COMMISSIONER OF	)	TAX COURT
INTERNAL REVENUE,	)	
	)	
Appellee.	)	

Before: MARTIN, DAUGHTREY, and KETHLEDGE, Circuit Judges.

KETHLEDGE, Circuit Judge.

Jeffrey Davis and his attorney, Robert Jones, appeal the United State Tax Court's orders imposing monetary sanctions on them for pursuing frivolous claims and unnecessarily multiplying litigation concerning Davis' tax liability. We dismiss Jones's appeal and affirm the sanctions on Davis

I.

Jeffrey and Laura Davis--like Robert Jones's clients in *Gillespie v. Comm'r*, 208 WL 42, 18808 (7th Cir. 2008)--"are, or at least were, tax protestors." *Id.* at *1. The Davises underpaid their joint federal income taxes in 1997, 1998, and 1999 by diverting their income to a sham trust. The trust also underpaid its taxes in 1999. Upon discovering the underpayments, the Internal Revenue Service sent various notices of deficiency to both the Davises and to the trust. These notices provided the Davises with an opportunity to challenge the alleged deficiencies in the United States Tax Court.

Jeffrey Davis, but not Laura, filed such a challenge with respect to the 1997 and 1998 deficiencies. But he failed to prosecute the challenge or to answer the Commissioner's discovery requests. The tax court upheld the IRS's determination and imposed a $25,000 penalty on Davis pursuant to 26 U.S. C. § 6673(a)(1) for instituting or maintaining the case primarily for delay. (That is not the sanction at issue here.) Davis did not appeal. Neither the Davises nor the trust disputed the 1999 deficiency notices. Consequently, the IRS issued tax assessments against both Davises and the trust for all three tax years.

The Davises did not pay the assessments. As a result, the IRS sent them a "Final Notice-Notice of Intent to Levy and Notice of Your Right to a

Hearing," for each tax deficiency. In response, the Davises retained Jones as their attorney , and requested a Collection Due Process (CDP) hearing. They alleged the existence of "impermissible whipsaws," and claimed that Laura Davis was "an 'innocent spouse.'" But Laura Davis did not submit an IRS Form 8857, which is a prerequisite to obtaining tax relief as an innocent spouse.

The IRS Settlement Officer for the case, Michael Freitag, set the CDP hearing date for July 19, 2004. At Jones's request, Freitag postponed the hearing until August 24, 2004. Jones failed to appear on that date. The hearing was eventually held by telephone on September 7 2004.

At the hearing, Freitag found that, by statute, the Davises and the trust could not contest their underlying tax liability because each had received a notice of deficiency and because the tax court had already determined that Jeffrey Davis was liable for payments in tax years 1997 and 1998. Freitag also noted that he could not consider any collection alternatives because the Davises had not presented any. Freitag therefore issued notices of determination sustaining the government's filings and proposed tax levies.

The Davises then filed petitions for review of that ruling in the tax court. They claimed the IRS had wrongly disallowed certain deductions and had used "impermissible whipsaws." J.A. 85. They also

alleged they had not been allowed to present collection alternatives, and had not been granted "sufficient time to retrieve IRS documentation[.]" *Id.* Finally, they claimed that the assessments violated the statute of limitations, and that Laura Davis was an "innocent spouse."

The Commissioner moved for summary judgment as to each of the assessments, which the tax court granted as to most issues. The court held that the Davises had improperly attempted to challenge their underlying tax liability, and that their "whipsaw" claim was "without content or explanation[.]" The court also held that Freitag had not entertained collection alternatives for the simple reason that the Davises had not provided any. Similarly, the court held that the IRS had no obligation to provide documents the Davises had never requested. *Id.* at 584. The court further held that Laura Davis's failure to file a Form 8857 precluded her claim for relief as an innocent spouse. *Id.* at 586. The court did not grant summary judgment as to the Davises' statute of limitations defense because the court "fail[ed] to understand petitioner's argument, which may involve a material issue of fact." *Id.*

The court then considered sanctions. It noted its impression that the Davises may have "instituted and maintained this proceeding primarily to delay" collection of taxes, that they had "raised frivolous arguments and relied on groundless claims" and that

"counsel [Jones] may have taken actions to multiply this proceeding unreasonably and vexatiously." *Id.* at 587. The court ordered the parties to appear and "show cause why a penalty pursuant to section 6673(a)(i) should not be imposed" upon Jeffrey Davis and Robert Jones. *Id.*

The parties appeared for the hearing on February 28, 2006. They announced they had reached a settlement as to the taxes owed, and that the Davises had abandoned their statute of limitations defense. The hearing then proceeded on the sanctions issue. The court issued its decision on July 24, 2006, imposing a $15,000 sanction on Jeffrey Davis. The court found that Davis had brought and maintained his claims "primarily for delay," and that "he raised frivolous arguments and relied on groundless positions." *Davis v. Comm'r*, 94 T.C.M. (CCH) 81 (2007) at *9.

The court also sanctioned Jones for "intentionally abus[ing] the judicial process by bringing and continuing these cases." The court cited several cases in which Jones—unsuccessfully--made near-identical arguments on behalf of other taxpayers. *Id.* at *12. The sanctions against Jones totaled $25,800.

This appeal followed. Both Davis and Jones now seek to challenge the sanctions imposed on them.

II.

This case appears to be virtually identical to *Gillespie*—in which Jones was counsel. The result we reach here is identical to the result the Seventh Circuit reached there.

A.

Like the Seventh Circuit in *Gillespie*, we lack jurisdiction to consider Jones's appeal of the sanctions imposed on him. "A notice of appeal must specify the party or parties taking the appeal by naming each appellant in either the caption or the body of the notice of appeal." Fed. R. App. P. 3(c). "The requirements of Rule 3(c) are jurisdictional in nature, and the court of appeals may not waive or diminish the rule's requirements." *Maerki v. Wilson*, 128 F.3d 1005, 1007 (6th Cir. 1997).

Jones did not meet those requirements here with respect to his putative appeal of the sanctions imposed on him. Jones filed a single notice of appeal. Its caption listed "Laura K. Davis, et al." as Petitioners. The body of the notice read as follows:

> Notice is hereby given that Laura K. Davis and Jeffrey Davis, hereby appeal to the United States Court of Appeals for the Sixth Circuit from the Order and Decision of this Court entered in the above captioned proceeding on the 24th day of July 2007, T.C. Memo. 2007-201.

Respectfully submitted this 16th day of October, 2007.

Robert Alan Jones, esq. [sic]
Attorney for Laura K. Davis
and Jeffrey Davis

(Emphasis added.)

Thus, in this case, as in *Gillespie*, "neither the caption nor the body of the notice of appeal mentions Jones, who is not a party to the proceeding in the Tax Court." *Id.* at*1. And here, as there, "he signed the document as counsel . . . not as appellant." *Id.* (emphasis added). Consequently, "the notice of appeal does not present for decision any issues concerning Jones." *Id.* Binding precedent from this court—namely, *Maerki*—compels the same conclusion. There, as here, a party and his attorney were each sanctioned by the lower court. *Maerki*, 128 F.3d at 1007. Each sought to overturn the award. *Id.* And there, as here, the attorney sought to argue his own appeal after failing to list himself as an appellant on the notice of appeal. Id. At 1008. We held that, "[b]ecause it is possible that only one party will appeal a judgment entered against multiple parties, and because the notice of appeal in this case clearly indicated [the client's] intent to appeal, it cannot be said that the notice's reference to the March 19 judgment provided objectively clear notice of [the attorney's] intent to appeal." *Id.* At 1007-08.

The same is true here. The notice of appeal nowhere mentions Jones's intent to appeal. We therefore lack jurisdiction to hear his appeal of the sanctions award against him.

B.

We next address Davis's appeal. We review for abuse of discretion the tax court's imposition of sanctions under 26 U.S.C. § 6673(a)(1). *Hauck v. Comm'r*, 64 Fed. App'x 492, 493 (6th Cir. 2003 (unpublished).

Section 6673(a)(1) allows the tax court to impose sanctions on a party when "proceedings before [the court] have been instituted or maintained by the taxpayer primarily for delay," or "the taxpayer's position in such proceeding is frivolous or groundless," of "the taxpayer unreasonably failed to pursue available administrative remedies[.]" 26 U.S.C. § 6673(a)(1).

Here, the tax court found Davis's claims to be meritless and instituted primarily for delay. The court observed that Davis had no basis to challenge his underlying tax liability, because he had received notices of deficiency and an adverse judgment. The court also noted that Laura Davis had not filed a Form 8857, and thus had no basis for seeking relief as an innocent spouse. The court then turned to Davis's statute of limitations theory. Davis, the court held, neglect[ed] even to discuss . . . [the]

theory in his written responses to our orders to show cause, which suggests to us that he no longer attaches any value to [it]." In sum, the court found, "[n]either by his testimony . . . nor his written responses . . . has Mr. Davis shown us the merit of any averment, claim, or argument advanced by him." Moreover, the court stated, it need not make a finding of bad faith before imposing a monetary sanction on a party pursuant to 26 U.S..C. § 6673(a)(1)(B). Therefore, it held, sanctions totaling $15,000 were appropriate.

That holding was not an abuse of discretion. Davis's challenge to the amount of his underlying tax liability was indeed proscribed by 26 U.S.C. § 6330(c)(2)(B). *See, e.g., Living Care Alternatives of Utica, Inc. v. United States,* 411 Fl..3d 621, 624 (6th Cir.2005); *Gillespie*, 2008 WL 4218808 at *1; *Kindred v. Comm'r.,* 454 F.3d 688, 694 n. 15 (7th Cir. 2006)(holding that the Kindreds—repres ented by Jones—could not challenge their underlying tax liability after receiving notices of deficiency). Davis likewise lacked any legal authority supporting his statute of limitations defense, which was based on a dubious theory advanced by a putative expert witness who was herself not authorized to represent taxpayers before the IRS. In addition, Laura Davis's innocent-spouse claim was, as the tax court held, flatly precluded by her failure to file a Form 8857. *See Kindred,* 454 F.3d at 698 (holding that Mrs. Kindred—represented by Jones—could not claim innocent-spouse relief where she failed to file a Form

8857). The Davises complained about the IRS's failure to consider collection alternatives that they never proposed, and its failure to produce documents they never requested—which again were precisely the stalling tactics attempted, and sanctioned, in *Gillespie*. *See* 2008 WL 4218808 at *1; *see also Kindred*, 454 F.3d at 696 ("The Kindreds' argument that they should have been allowed to submit an offer in compromise is frivolous" because "the Kindreds failed to ever actually make an offer in compromise").

All of this is more than "enough to show that the petition was frivolous, as the Tax Court found." *Gillespie*, 208 WL 4218808 at *2. None of Davis's other arguments on appeal—most of which lack any citation to legal authority—diminish this core holding. "There is no right to engage in frivolous litigation in order to delay collection." *Id.* The tax court did not abuse its discretion in imposing sanctions upon Davis pursuant to 26 U.S.C. § 6673(a)(1).

III.

For these reasons, we affirm the orders of the tax court.

07-2388

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LAURA DAVIS, et al.,	)	
	)	**FILED**
Petitioners-Appellants,	)	**FEB 19, 2009**
	)	Leonard Green,
v.	)	Clerk
	)	
COMMISSIONER OF INTERNAL REVENUE	)	ORDER
	)	
	)	
Respondent-Appellee.	)	

BEFORE: MARTIN, DAUGHTREY, and KETH LEDGE, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original

submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green,
Clerk

UNITED STATES TAX COURT

LAURA K. DAVIS, Petitioner,	)	
	)	Docket No. 144-05L
COMMISSIONER OF INTERNAL REVENUE, Respondent.	)	Judge Halpern

DECISION

Pursuant to the agreement of the parties in this case, it is

ORDERED and DECIDED:

That the determination set forth in the Notice of Determination Concerning Collection Action (s) under Section 6320 and/or 6330 issued to petitioner on December 2, 2004, with respect to petitioner's income tax liability for the 1999 taxable year, and upon which this case is based, is sustained.

Judge.

Entered:

* * * * *

Docket No. 144-05L

It is hereby stipulated that the Court may enter the foregoing decision in this case.

DONALD L. KORB
Chief Counsel
Internal Revenue Service

/s/ Robert Alan Jones
ROBERT ALAN JONES
Counsel for Petitioner
1061 East Flamingo Road
Suite 7,
Las Vegas, NV 89119
(702) 791-3403

Date: 2/13/2006

/s/ Paul C. Feinberg
PAUL C. FEINBERG
Associate Area Counsel
(Small Business/Self-Employed) Tax Court Bar No. FP0022
110 City Parkway, Ste 301
Las Vegas, NV 89106
(702) 868-5154

Date: 2/28/2006

/s/ Maria Angelisa LaCorte
MARIA ANGELISA LACORTE
Counsel for Petitioner
1061 East Flamingo Road
Suite 7
Las Vegas, NV 89119
(702) 791-3403

Date: 2/13/2006

UNITED STATES TAX COURT

JLD Asset Management Company a.k.a. JLD Asset Management Trust, Jeffrey Davis, Trustee	)	
Petitioner,	)	
v.	)	Docket No. 145-05L
Commissioner of Internal Revenue	)	Judge Halpern
Respondent.	)	

DECISION

Pursuant to the agreement of the parties in this case, it is

ORDERED and DECIDED:

That the determination set forth in the Notice of Determination Concerning Collection Action (s) under Section 6320 and/or 6330 issued to petitioner on December 2, 2004, with respect to petitioner's income tax liability for the 1999 taxable year, and upon which this case is based, is sustained.

Judge.

Entered:

* * * * *

It is hereby stipulated that the Court may enter the foregoing decision in this case.

It is further stipulated that the parties agree that the JLD Asset Management Company will be disregarded for Federal income tax purposes, and that the income, expense, deductions and credits of the JLD Asset Management Company for the 1999 taxable year, as determined by agreement of the parties and to the extent reportable or allowable by the Internal Revenue Code, have been included in an amended individual income tax return submitted by Jeffrey W. & Laura K. Davis for the 1999 taxable year.

It is further stipulated that the parties agree that the JLD Asset Management Company is a nominee or alter ego of Jeffrey W. & Laura K. Davis; all assets held in the name of the JLD Asset Management Company are held for the benefit of Jeffrey W. & Laura K. Davis; there was no substantial change in the way business and personal matters of Jeffrey W. & Laura K. Davis were handled before and after the formation of the JLD Asset Management Company; and certain personal living expenses of Jeffrey W. & Laura K. Davis have been paid by the JLD Asset Management Company.

It is further stipulated that respondent will abate the tax and additions to tax previously assessed against the JLD Asset Management Company for the 1999 taxable year, as follows:

Amounts to be Abated

Year	Income Tax	Additions to tax
1999	$121,948.00	$24,389.60

It is further stipulated that interest is not included in the above - referenced abatement amounts, and that the interest amounts previously assessed for the 1999 taxable year in connection with those amounts will also be abated.

It is further stipulated that there are no overpayments due to the JLD Asset Management Company for the 1999 taxable year.

DONALD L. KORB
Chief Counsel
Internal Revenue Service

/s/ Robert Alan Jones
ROBERT ALAN JONES
Counsel for Petitioner
1061 East Flamingo Road
Suite 7,
Las Vegas, NV 89119
(702) 791-3403

Date: 2/13/2006

/s/ Paul C. Feinberg
PAUL C. FEINBERG
Associate Area Counsel
(Small Business/Self-Employed)
Tax Court Bar No. FP0022
110 City Parkway, Ste 301
Las Vegas, NV 89106
(702) 868-5154

Date: 2/28/2006

/s/ Maria Angelisa LaCorte
MARIA ANGELISA LACORTE
Counsel for Petitioner
1061 East Flamingo Road
Suite 7
Las Vegas, NV 89119
(702) 791-3403

Date: 2/13/2006

UNITED STATES TAX COURT

JEFFREY W. DAVIS	)	
Petitioner,	)	
	)	
	)	Docket No.
	)	146-05L
COMMISSIONER OF INTERNAL REVENUE	)	
	)	
	)	Judge Halpern
Respondent.	)	

DECISION

Pursuant to the agreement of the parties in this case, it is

ORDERED and DECIDED:

That the determination set forth in the Notice of Determination Concerning Collection Action(s) under Section 6320 and/or 6330 issued to petitioner on December 2, 2004, with respect to petitioner's income tax liabilities for the 1997 and 1998 taxable years, and upon which this case is based, is sustained.

Judge.

Entered:

* * * * *

It is hereby stipulated that the Court may enter the foregoing decision in this case.

It is further stipulated that the parties agree that the JLD Asset Management Company (TIN 36-7211251) and the Davis Charitable Trust (TIN 31-6587917) will be disregarded for Federal income tax purposes, and that the income, expense, deductions and credits of the JLD Asset Management Company and the Davis Charitable Trust for the 1997 and 1998 taxable years, as determined by agreement of the parties and to the extent reportable or allowable by the Internal Revenue Code, have been included in amended individual income tax returns submitted by petitioner for the 1997 and 1998 taxable years.

It is further stipulated that the parties agree that: the JLD Asset Management Company and the Davis Charitable Trust are nominees or alter egos of petitioner; all assets held in the name of the JLD Asset Management Company and the Davis Charitable Trust are held for the benefit of petitioner; there was no substantial change in the way business and personal matters were handled before and after the formation of the JLD Asset Management Company and the Davis Charitable Trust; and, certain personal living expenses of petitioner have been paid by the JLD Asset Management Company.

It is further stipulated that the deficiency in tax imposed on petitioner by the Internal Revenue Code for taxable years 1997 and 1998, as agreed to by the parties after inclusion of items associated with the JLD Asset Management Company and the Davis Charitable Trust, is as follows:

Year	Income Tax	Additions to tax I. R.C. § 6662
1997	$56,707.00	$11,341.40
1998	$82,635.00	$16,527.00

It is further stipulated that, in order to adjust the separate assessments against Jeffrey W. Davis for 1997 and 1998 to reflect the deficiency amounts agreed to by the parties as indicated above, respondent will abate a portion of the tax and additions to tax previously assessed for those years as follows:

Previously Assessed

Year	Income Tax	Additions to tax I.R.C. § 6662
1997	$127,357.00	$25,535.20
1998	$195,189.00	$38,603.60

Amounts to be abated

Year	Income Tax	Additions to tax I. R.C. § 6662
1997	$70,650.00	$14,193.80
1998	$112,554.00	$22,076.60

It is further stipulated that interest is not included in the above-referenced tax liabilities, and that interest will be assessed and/or abated as provided by law on the deficiency liability amounts for the 1997 and 1998 taxable years that have been agreed to by the parties.

It is further stipulated that there are no overpayments due to petitioner for the 1997 and 1998 taxable years.

DONALD L. KORB
Chief Counsel
Internal Revenue Service

/s/ Robert Alan Jones
ROBERT ALAN JONES
Counsel for Petitioner
1061 East Flamingo Road
Suite 7,
Las Vegas, NV 89119
(702) 791-3403

Date: 2/13/2006

/s/ Paul C. Feinberg
PAUL C. FEINBERG
Associate Area Counsel
(Small Business/Self-Employed)
Tax Court Bar No. FP0022
110 City Parkway, Ste 301
Las Vegas, NV 89106
(702) 868-5154

Date: 2/28/2006

/s/ Maria Angelisa LaCorte
MARIA ANGELISA LACORTE
Counsel for Petitioner
1061 East Flamingo Road
Suite 7
Las Vegas, NV 89119
(702) 791-3403

Date: 2/13/2006

UNITED STATES TAX COURT

JEFFREY W. DAVIS Petitioner,	)	Docket No. 147- 05L
COMMISSIONER OF INTERNAL REVENUE Respondent.	)	Judge Halpern

DECISION

Pursuant to the agreement of the parties in this case, it is

ORDERED and DECIDED:

That the determination set forth in the Notice of Determination Concerning Collection Action (s) under Section 6320 and/or 6330 issued to petitioner on December 2, 2004, with respect to petitioner's income tax liability for the 1999 taxable year, and upon which this case is based, is sustained.

Judge.

Entered:

* * * * *

It is hereby stipulated that the Court may enter the foregoing decision in this case.

It is further stipulated that the parties agree that the JLD Asset Management Company (TIN 36-7211251) and the Davis Charitable Trust (TIN 31- 6587917) will be disregarded for Federal income tax purposes, and that the income, expense, and deductions of the JLD Asset Management Company and the Davis Charitable Trust for the 1999 taxable year, as determined by agreement of the parties andas allowed by the Internal Revenue Code, have been included in an amended individual income tax return submitted by petitioner for the 1999 taxable year.

It is further stipulated that the parties agree that: the JLD Asset Management Company and the Davis Charitable Trust are nominees or alter egos of petitioner; all assets held in the name of the JLD Asset Management Company and the Davis Charitable Trust are held for the benefit of petitioner; there was no substantial change in the way business and personal matters were handled before and after the formation of the JLD Asset Management Company and the Davis Charitable Trust; and, certain personal living expenses of petitioner have been paid by the JLD Asset Management Company.

It is further stipulated that the tax imposed on petitioner and petitioner's spouse, Laura K. Davis,

by the Internal Revenue Code for taxable year 1999, as agreed to by the parties after inclusion of items associated with the JLD Asset Manaagment Company and the Davis Charitable Trust, is as follows:

Year	Income Tax	Additions to tax I. R.C. § 6662
1999	$93,743.00	$16,824.00

It is further stipulated that the above-referenced 1999 tax liability does not take into account the following payments:

Year	Estimated Tax Payments	Payment with Return
1999	$8,000.00	$1,623.00

It is further stipulated that respondent will abate $55,512.00 of the $149,255.00 in tax previously assessed against petitioner and petitioner's spouse, Laura K. Davis, for the 1999 taxable year, and will abate $11,102.40 of the $27,926.40 addition to tax previously assessed against them for the1999 taxable year under I.R.C. §6662, in order to adjust the 1999 assessments for those items to the amounts agreed to by the parties as indicated above.

It is further stipulated that interest is not included in the above-referenced tax liability, and

that interest will be assessed and/or abated as provided by law on the liability amounts for the 1999 taxable year that have been agreed to by the parties.

It is further stipulated that there are no overpayments due to petitioner for the 1999 taxable year.

DONALD L. KORB
Chief Counsel
Internal Revenue Service

/s/ Robert Alan Jones
ROBERT ALAN JONES
Counsel for Petitioner
1061 East Flamingo Road
Suite 7,
Las Vegas, NV 89119
(702) 791-3403

Date: 2/13/2006

/s/ Paul C. Feinberg
PAUL C. FEINBERG
Associate Area Counsel
(Small Business/Self-Employed)
Tax Court Bar No. FP0022
110 City Parkway, Ste 301
Las Vegas, NV 89106
(702) 868-5154

Date: 2/28/2006

/s/ Maria Angelisa LaCorte
MARIA ANGELISA LACORTE
Counsel for Petitioner
1061 East Flamingo Road
Suite 7
Las Vegas, NV 89119
(702) 791-3403

Date: 2/13/2006

UNITED STATES TAX COURT

LAURA K. DAVIS, Petitioner,	)	
	)	Docket No. 149-05L
COMMISSIONER OF INTERNAL REVENUE, Respondent.	)	Judge Halpern

DECISION

Pursuant to the agreement of the parties in this case, it is

ORDERED and DECIDED:

That the determination set forth in the Notice of Determination Concerning Collection Action(s) under Section 6320 and/or 6330 issued to petitioner on December 2, 2004, with respect to petitioner's income tax liabilities for the 1997 and 1998 taxable years, and upon which this case is based, is sustained.

Judge.

Entered:

* * * * *

It is hereby stipulated that the Court may enter the foregoing decision in this case.

It is further stipulated that the parties agree that the JLD Asset Management Company (TIN 36-7211251) and the Davis Charitable Trust (TIN 31-6587917) will be disregarded for Federal income tax purposes, and that the income, expense, deductions and credits of the JLD Asset Management Company and the Davis Charitable Trust for the 1997 and 1998 taxable years, as determined by agreement of the parties and to the extent reportable or allowable by the Internal Revenue Code, have been included in amended individual income tax returns submitted by petitioner for the 1997 and 1998 taxable years.

It is further stipulated that the parties agree that: the JLD Asset Management Company and the Davis Charitable Trust are nominees or alter egos of petitioner; all assets held in the name of the JLD Asset Management Company and the Davis Charitable Trust are held for the benefit of petitioner; there was no substantial change in the way business and personal matters were handled before and after the formation of the JLD Asset Management Company and the Davis Charitable Trust; and, certain personal living expenses of petitioner have been paid by the JLD Asset Management Company.

It is further stipulated that the deficiency in tax imposed on petitioner by the Internal Revenue Code for taxable years 1997 and 1998, as agreed to by the parties after inclusion of items associated with the JLD Asset Management Company and the Davis Charitable Trust, is as follows:

Year	Income Tax	Additions to tax I. R.C. § 6662
1997	$56,707.00	$11,341.40
1998	$82,635.00	$16,527.00

It is further stipulated that, in order to adjust the separate assessments against Laura K. Davis for 1997 and 1998 to reflect the deficiency amounts agreed to by the parties as indicated above, respondent will abate a portion of the tax and additions to tax previously assessed for those years as follows:

Previously Assessed

Year	Income Tax	Additions to tax I. R.C. § 6662
1997	$127,676.00	$25,535.00
1998	$195,189.00	$38,603.60

Amounts to be abated

Year	Income Tax	Additions to tax I. R.C. § 6662
1997	$70,969.00	$14,193.60
1998	$112,554.00	$22,076.60

It is further stipulated that interest is not included in the above-referenced tax liabilities, and that interest will be assessed and/or abated as provided by law on the deficiency liability amounts for the 1997 and 1998 taxable years that have been agreed to by the parties.

It is further stipulated that there are no overpayments due to petitioner for the 1997 and 1998 taxable years.

DONALD L. KORB
Chief Counsel
Internal Revenue Service

/s/ Robert Alan Jones
ROBERT ALAN JONES
Counsel for Petitioner
1061 East Flamingo Road
Suite 7,
Las Vegas, NV 89119
(702) 791-3403

Date: 2/13/2006

/s/ Paul C. Feinberg
PAUL C. FEINBERG
Associate Area Counsel
(Small Business/Self-Employed)
Tax Court Bar No. FP0022
110 City Parkway, Ste 301
Las Vegas, NV 89106
(702) 868-5154

Date: 2/28/2006

/s/ Maria Angelisa LaCorte
MARIA ANGELISA LACORTE
Counsel for Petitioner
1061 East Flamingo Road
Suite 7
Las Vegas, NV 89119
(702) 791-3403

Date: 2/13/2006

T. C. Memo. 2007-201

UNITED STATES TAX COURT

LAURA K. DAVIS, ET AL., [1]
Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

Filed July 24, 2007.

Docket Nos. 144-05L, 145-05L,
146-05L, 147-05L,
149-05L.

These cases brought pursuant to sec. 6330, I.R.C., are before the Court to determine whether Parties must pay penalties pursuant to sec. 6673(a)(1), I.R.C., for instituting procedures primarily for delay, etc., and whether counsel must pay R's excess counsel fees pursuant to sec. 6673(a)(2), I.R.C., for unreasonably and vexatiously multiplying the proceedings.

1. Held: P husband penalized pursuant to sec.6673(a)(1), I.R.C., for instituting and maintaining

---

1-Cases of the following petitioners are consolidated herewith: JLD Asset Management Co., a.k.a. JLD Asset Management Trust, Jeffrey Davis, Trustee, docket No. 145-05L; Jeffrey W. Davis, docket No. 146-05L; Jeffrey W. Davis, docket No. 147-05L; and Laura K. Davis, docket No. 149-05L.

proceedings primarily for delay, making frivolous arguments and taking groundless positions, and unreasonably failing to pursue available administrative remedies.

2. Held , further , Ps' lead counsel liable for R's attorney's fees since he signed pleadings and other papers knowing Ps' claims to be meritless and, thus, abused the judicial process and unreasonably and vexatiously multiplied the proceedings.

Robert Alan Jones , Maria Angelisa L. Lacorte , and Mario P. Fenu , for petitioners.

Alan J. Tomsic and Paul C. Feinberg , for respondent.

MEMORANDUM OPINION

HALPERN, Judge : Each of the cases in this consolidated proceeding is before the Court to determine whether the petitioner therein must pay a penalty pursuant to section 6673(a)(1) and whether two of petitioners' counsel common to all of the cases, Robert Alan Jones (Mr. Jones) and Maria Angelisa L. Lacorte (Ms. Lacorte), must pay certain of respondent's costs pursuant to section 6673(a)(2). For the reasons that follow, we impose on petitioner Jeffrey W. Davis (Mr. Davis) penalties totaling $15,000 and on Mr. Jones costs totaling $25,800.

Unless otherwise indicated, all section references are to the Internal Revenue Code of 1986, as amended, and all Rule references are to the Tax Court Rules of Practice and Procedure.

Generally, we shall use the term "counsel" to refer to Mr. Jones and Ms. Lacorte.

Background

Introduction

Each of these cases began with a petition for review of a determination by respondent's Appeals Office (Appeals) that respondent might proceed with certain activities to collect unpaid tax (or taxes) owed by petitioner. The docket numbers, petitioners, and years in issue are as follows:

Docket No.	Petitioner	Year (s)
144-05L	Laura K. Davis	1999
145-05L	JLD Asset Management Co., a/k/a JLD Asset Management Trust, Jeffrey Davis, Trustee	1999
146-05L	Jeffrey W. Davis	1997, 1998
147-05L	Jeffrey W. Davis	1999
149-05L	Laura K. Davis	1997, 1998

Each petitioner resided in Beavercreek, Ohio, at the time he or she (without distinction, he) filed the petition.

At the call of these cases from the calendar for the trial session of the Court at Las Vegas, Nevada, commencing on February 27, 2006 (the Las Vegas trial session), the Court received from the parties to each case a proposed decision document sustaining Appeals' determination that respondent might proceed with the collection activities in question in that case. We filed each proposed decision document as a stipulation of settlement to facilitate the Court's dealing with the penalty and costs issues before us today. We ordered each petitioner to show cause in writing why, in each case in which he is involved, a penalty should not be imposed on him pursuant to section 6673(a)(1), and we ordered Mr. Jones and Ms. Lacorte to show cause why, in each case, excess costs should not be imposed on them pursuant to section 6673(a)(2). We also ordered respondent to inform the Court of his fees and costs incurred in these cases and of his positions with respect to the penalties and costs at issue. We explained to the parties and to counsel that our orders to show cause were motivated by our concern that petitioners had raised, and their counsel had abetted them in raising, meritless arguments that had served merely to delay the collection of taxes owing. In addition to ordering petitioners and their counsel to respond in writing to our orders to show cause, we accorded each the opportunity to appear and be heard. Finally, in the face of the stipulations of settlement, we vacated the orders we had entered granting, in

whole or in part, respondent's motions for summary judgment.

1997 and 1998 Tax Liabilities

On March 5, 2001, respondent issued to Mr. Davis and petitioner Laura K. Davis (Ms. Davis) a notice of deficiency with respect to their joint1997 and 1998 Federal income taxes. Mr. Davis timely filed a petition in this Court for a redetermination of the deficiencies; Ms. Davis did not file a petition. On February 11, 2003, we entered an order and decision in Mr. Davis's case, sustaining the deficiencies in full and imposing a penalty of $25,000 upon him under section 6673(a)(1) for instituting the case for purposes of delay and for making frivolous arguments. 2

2-In support of our order and decision, we relied on the following deemed admissions (paragraph numbers and ellipses omitted):

Petitioner Jeffrey W. Davis created a series of sham trusts designed to assist him in evading the payment of his Federal income and employment taxes.

Petitioner Jeffrey W. Davis created the JLD Asset Management Trust to avoid paying his Federal taxes.

The JLD Asset Management Trust is a sham trust.

The Davis Charitable Trust is a sham trust.

The petitioner Jeffrey W. Davis instituted this case to delay the assessment of his individual income taxes for the taxable years 1997 and 1998.

Mr. Davis did not appeal the order and decision. Respondent timely assessed the 1997 and 1998 deficiencies and other amounts on August 1, 2001 (Ms. Davis, for 1997), September 24, 2001 (Ms. Davis, for 1998), and August 19, 2003 (Mr. Davis, for 1997 and 1998).

1999 Tax Liabilities

On April 7, 2003, respondent issued to petitioner JLD Asset Management Trust, Jeffrey W. Davis, trustee (the trust and the trustee, respectively), a notice of deficiency with respect to the trust's 1999 Federal income tax and issued to Mr. and Ms. Davis a notice of deficiency with respect to their 1999 Federal income tax. Neither the trustee, Mr. Davis, nor Ms. Davis filed a petition for redetermination of the deficiency, and respondent timely assessed the 1999 deficiencies and other amounts on August 19, 2003 (Mr. and Ms. Davis), and September 15, 2003 (the trust).

The petitioner Jeffrey W. Davis instituted this case to use the Tax Court as a forum to present frivolous constitutional and procedural arguments against the United States' Federal income tax system.

The petitioner Jeffrey W. Davis fired his attorney, Scott W. Gross, after Mr. Gross refused to file frivolous motions in connection with this case.The petitioner Jeffrey W. Davis intentionally, recklessly and negligently disregarded the Federal tax laws in the preparation of his 1997 and 1998 Federal income tax returns.

Notices

On March 15, 2004, respondent sent to each petitioner with respect to each year of that petitioner in issue a Final Notice - Notice of Intent to Levy and Notice of Your Right to a Hearing (final notice).

On March 19, 2004, respondent sent to each petitioner with respect to each year of that petitioner in issue a Notice of Federal Tax Lien Filing and Your Right to a Hearing Under IRC 6320 (NFTL). Each NFTL notified the recipient that respondent had filed a lien with respect to the recipient's unpaid Federal income tax liability (or liabilities) for the year (or years) in issue.

Responses and Hearing

On April 13, 2004, in response to the final notices and the NFTLs, each petitioner filed with Appeals an Internal Revenue Service (IRS) Form 12153, Request for a Collection Due Process Hearing. On those forms, petitioners commonly allege that there exist "whipsaws" with related entities or persons. Ms. Davis alleges that she is an "innocent spouse". Mr. Jones signed the Forms 12153 as each petitioner's authorized representative.

On June 18, 2004, in response to the Forms 12153, an Appeals employee, Settlement Officer Michael A. Freitag (the settlement officer), sent Mr. Jones a letter scheduling a hearing for July 19, 2004, with respect to all of the hearing requests. Among

other things, the letter states that, if Mr. Jones wishes to propose collections alternatives, such as an installment agreement or an offer-in-compromise, he must complete and submit current financials statements, along with verification, prior to the hearing date. The hearing was rescheduled for August 24, 2004, but Mr. Jones failed to appear. On September 7, 2004,the settlement officer held a telephone conference with Mr. Jones.

Determinations

On December 2, 2004, Appeals issued to each petitioner a "Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330" (notice). The notices sustain the filing of the lien and the proposed levy action. Each notice is accompanied by an attachment, wherein the settlement officer sets forth the analysis leading to his conclusion that the collection actions should be sustained. The analysis in each attachment is similar, and the following are among the facts, generally similar in each attachment, on which the settlement officer relied: Petitioner could not challenge the underlying tax liability because he had received a notice of deficiency. Petitioner had neither requested release or withdrawal of the NFTL nor shown that he was entitled to release or withdrawal of the NFTL. No collection alternatives, such as an offer-in-compromise or an installment agreement, were finalized with petitioner because he either did not respond with any alternatives or still believes that he does not owe the liability and that this is a whipsaw case. Where relevant, petitioner had not

provided information necessary for innocent spouse relief for Mrs. Davis. Appeals had verified the assessments of tax. The requirements of all applicable laws and administrative procedures had been met. The proposed collection action balanced the need for efficient collection with petitioner's concern that any collection action be no more intrusive than necessary.

Petitions

On January 3, 2005, each petitioner timely petitioned for review of the notice received by that petitioner. Each petitioner assigned error in substantially the same terms. Except as noted, each (1) sought to challenge the tax liability underlying the collection actions at issue; (2) submitted that there were impermissible "whipsaws" with related entities or persons; (3) submitted that the settlement officer did not make a determination from petitioner's tax returns; (4) claimed the settlement officer did not allow him to raise collection alternatives, including an offer-in-compromise; (5) claimed the settlement officer did not allow sufficient time for him to retrieve IRS documentation to test whether the period of limitations on assessment had expired; (6) alleged that the assessments were time barred and violated the statute of limitations; and (7) in docket Nos. 144-05L and 149-05L, claimed "innocent spouse protection" for Ms. Davis. Mr. Jones executed each petition on behalf of the named petitioner. Respondent answered the petitions, denying or otherwise countering those claims.

The petitions are substantially similar to petitions filed by Mr. Jones on behalf of taxpayers in at least eight other cases, six of them calendared for trial at the Las Vegas trial session. Three of those cases are the subject of our report in Gillespsie v. Commissioner, released today as T.C. Memo. 2007-202.

Ms. Lacorte's Appearance

On November 17, 2005, Ms. Lacorte filed an entry of appearance in each case.

Amended Petitions

On December 16, 2005, approximately 2-1/2 months before commencement of the Las Vegas trial session, each petitioner moved for leave to amend petition. Those motions are signed by Mr. Jones and Ms. Lacorte. The accompanying amended petitions were lodged with the Court on the same date, and, on December 19, 2005, we ordered respondent to respond to the motions for leave to amend. On January 5 and 6, 2007, we filed respondent's objections to the motions. On January 10, 2006, we granted all of the motions, and we filed the amended

petitions.[3] Mr. Jones executed each amended petition on behalf of the named petitioner.

In each amended petition, petitioner avers numerous instances of abuse of discretion by the settlement officer; viz, (1) He did not give petitioner adequate time to make his case, including raising collection alternatives, such as an offer-in-compromise; (2) petitioner's counsel was not provided documentation showing that the IRS had met the requirements of all applicable laws and administrative procedures; (3) the settlement officer failed to provide petitioner a copy of his individual master file; (4) the assessment of tax was backdated and collection was time barred; (5) the settlement officer was biased against petitioner "because of Petitioner's use of the trust system"; (6) "there are impermissible 'whipsaws' with related entities or individuals"; and (7) in docket Nos. 144-05L and 149-05L, Ms. Davis is entitled to " 'innocent spouse

---

3- Respondent objected to the motions on, among other grounds, that the proposed amendments were frivolous or groundless, provided no basis for relief, and were being raised solely for the purpose of delay. We granted the motions in light of the facts before us and the standard set forth in Rule 41 (a) that leave to amend shall be freely given. However, we directed the attention of petitioners' counsel to the provisions of Rule 33 (b), concerning the effect of signing a pleading (see discussion of Rule 33 (b) infra), and stated: "At the trial of this case, the Court expects petitioners' counsel to show that the claims in the amended petition are well grounded in fact and otherwise supported as set forth in Rule 33 (b). The Court warns petitioners and their counsel that, if justified, the Court will not hesitate to impose sanctions and costs as provided for in section 6673."

protection' ". In each case, respondent denied those averments.

The amended petitions are substantially similar to petitions filed by Mr. Jones on behalf of taxpayers in at least six other cases calendared for trial at the Las Vegas trial session. Three of those cases are the subject of our report in Gillespie v. Commissioner, supra .

Motions for Summary Judgment and Motion for Penalty

On January 5, 2006, in docket Nos. 146-05L and 149-05L, and on January 12, 2006, in the remaining cases, respondent moved for summary judgment. He relied on similar grounds in support of each motion: Since petitioner had received a notice of deficiency with respect to the underlying liability or liabilities (without distinction, liability), he could not challenge the liability. Thus, at his collection due process hearing, petitioner could raise only collection alternatives. Although nothing prevented him from doing so, he did not raise any collection alternative, nor did Ms. Davis present any basis for innocent spouse relief. Finally, no other error assigned by petitioner raised any justiciable issue or showed any abuse of discretion by the settlement officer. Respondent also moved in docket No. 146-05L (concerning Mr. Davis's 1997 and 1998 taxable years) that we impose a penalty on him under section 6673 in the amount of $25,000, "as petitioner has instituted this proceeding primarily for the purpose

of delay, and petitioner's position * * * is frivolous or groundless."

Petitioners' Objections

On February 6, 2006, each petitioner filed an objection to respondent's motion for summary judgment. No petitioner disputed that he failed to present collection alternatives. Each argued that the settlement officer had not given him adequate time to make his case. Each claimed that he required additional information to prepare collection alternatives and to resolve other issues relating to the years at issue. In docket Nos. 144-05L, 145-05L, and 147-05L, petitioners specifically argued that the settlement officer failed to allow additional time to retrieve relevant documents from the IRS. Each petitioner argued that the settlement officer was biased against him on account of his use of the trust system and that there were impermissible whipsaws with related entities or individuals. Ms. Davis, in docket Nos. 144-05l and 149-05L, claimed that she is an innocent spouse. Petitioners in each case except for docket No. 145-05L also continued to argue that the assessments of tax on which the collection actions were based were time barred. Mr. Davis, in docket No. 146-05L, contested the section 6673 penalty. Mr. Jones and Ms. Lacorte signed each of the objections.

Orders Disposing of Motions for Summary Judgment and Motion for Penalty

On February 17, 2006, we issued orders granting in full respondent's motion for summary judgment in docket No. 145-05L and granting in part his motions for summary judgment in the other four cases. In substantial part, the orders were similar. In each, we concluded that petitioner was prohibited from challenging the underlying liability. We found that petitioner had approximately 5-1/2 months to submit information to the settlement officer regarding collection alternatives but failed to do so. We determined that, where petitioner had claimed that he needed additional documents, he had not described to the settlement officer or to the Court those documents or their relevance. We concluded that the settlement officer need not have waited any longer than he did to make his determination. We rejected petitioner's claim that the settlement officer was required to provide documentation verifying that all applicable laws and procedures were followed or to produce petitioner's individual or business master files. We cited the following authority specifically holding that an Appeals officer is not required to produce that type of information. Nestor v. Commissioner, 118 T.C. 162, 166-167 (2002); Lunsford v. Commissioner, 117 T.C. 183, 187-188 (2001); Carrillo v. Commissioner , T.C. Memo. 2005-290. We found petitioner's claim of bias to be frivolous and unsubstantiated. We found that, beyond Ms. Davis's bare assertion that she was entitled to innocent spouse relief, she had done nothing (e.g., setting forth facts showing a genuine

issue for trial) to substantiate a claim to that relief. In the orders governing the four cases in which we granted respondent's motion for summary judgment only in part, we denied the motion only with respect to petitioner's affirmative defense of the statute of limitations. [4] Each of those petitioners based that defense on his claim that respondent had backdated his assessment (or assessments) of tax and, as a result, collection of the tax was time barred. In turn, each based his claim of backdating on his argument concerning the "cycle post date" of the assessment. Since that argument was unclear, but we were concerned that it might involve a material issue of fact, we declined to adjudicate summarily petitioners' affirmative defense claims.

By the order we issued in docket No. 146-05L, we also denied respondent's motion for a penalty under section 6673(a)(1). We explained that, because we were only granting partial summary judgment in that case, we would await further developments before determining whether a penalty is appropriate. We added that we would also consider imposing excess costs on counsel pursuant to section 6673(a)(2) should we conclude that counsel had taken actions to multiply the proceeding unreasonably and vexatiously. We likewise warned petitioners and counsel in the orders issued in the other cases that we were considering the imposition of penalties and

---

4-We determined that petitioner in docket No. 145-05L conceded that defense because the issue was not addressed in his opposition to the motion for summary judgment.

costs. In all of the orders, we stated our impressions that petitioner, aided by counsel, may have (1) instituted and maintained the proceeding before this Court primarily to delay the collection of his income tax liability, (2) in support of that goal, raised frivolous arguments and relied on groundless claims, and (3) unreasonably failed to pursue his opportunity for a section 6330 hearing. We cataloged our concerns with respect to each petitioner generally as follows: He had not challenged respondent's statements in support of the motion for summary judgment that petitioner received a notice of deficiency and failed to petition the Tax Court; he had failed to present the settlement officer any collection alternatives or the financial information necessary to consider collection alternatives; and, in the amended petition, he had made claims that had little or no substance, all but one of which we had rejected. We also noted the similarity of the amended petitions to petitions filed by counsel in other cases calendared for trial at the Las Vegas trial session and the shortness of the period between filing those amended petitions and the start of the trial session. We expressed our skepticism with respect to the "cycle post date" argument made in support of the statute of limitations defense, stating our suspicion, based on the rejection of the same or a similar argument in Dahmer v. United States, 90 AFTR 2d 2002- 6084, 200-2 USTC par. 50, 806 (W.D. Mo. 2002) Magistrate Judge's order), that the argument was frivolous. In docket No. 145-05L, the case in which we granted respondent's motion for summary judgment in full, we ordered petitioner and counsel to appear and be prepared to show cause

during the Las Vegas trial session why a penalty and excess costs should not be imposed on them, respectively. In the other cases, we left the penalty and cost issues for later resolution.

The Las Vegas Trial Session

As above stated, at the call of these cases from the calendar for the Las Vegas trial session, we received from the parties to each case a decision document (which we filed as a stipulation of settlement) sustaining Appeals' determination that respondent may proceed with the collection activities in question. In the face of the stipulations of settlement, we vacated our orders granting in whole or in part respondent's motions for summary judgment. We accorded each petitioner and counsel the opportunity to appear and be heard with respect to our orders to show cause why we should not impose on petitioner a penalty pursuant to section 6673(a)(1) and impose on counsel excess costs pursuant to section 6673(a)(2).

Mr. Davis appeared and was heard on February 28, 2006. The salient points of his testimony are as follows: He did not recall being advised that, because he received notices of deficiency, he could not challenge his underlying tax liability in a section 6330 hearing; he did not carefully review the amended petitions; Mr. Jones suggested filing the amended petitions; he did not recall reviewing the oppositions to respondent's motions for summary judgment; and he basically relied on the legal advice of Mr. Jones and Ms.

Lacorte in contesting respondent's collection actions and in filing his petitions in these cases. Ms. Davis did not appear and, therefore, was not heard.

Victoria Osborn (Ms. Osborn) was called by petitioners and, in pertinent part, testified as follows: She lives in Colorado and has a bachelor of science from the University of Colorado, with concentrations in accounting and finance. Her profession is public accountant, forensic accountant, and certified fraud examiner. She is not, however, a certified public accountant, nor is she licensed by the State of Colorado to practice accounting. She has never been employed by the IRS, and is not an enrolled agent or otherwise authorized to represent taxpayers before the IRS pursuant to Treasury Department Circular No. 230, Practice Before the Internal Revenue Service, 31 C.F.R. Part 10 (Rev. 6-2005). Among other things, she testified to the following: She had told Mr. Jones that the assessments of tax in these cases with respect to the taxable years in issue of both Mr. and Ms. Davis were time barred. The date of assessment of tax is the date an officer of the IRS signs a summary record of assessment. The data necessary to compile a summary record of assessment, however, is only available for that purpose after it has been posted to the IRS's master file system. On the basis of her examinations of transcripts of petitioners' individual master files for the years at issue, which revealed postings of assessments on dates subsequent to the assessment dates shown on those transcripts, she had reached the conclusion that the assessment

dates were not accurate and the true assessment dates were the dates of the postings.

Both Mr. Jones and Ms. Lacorte were accorded the opportunity to be heard with respect to our orders to show cause why excess costs should not be imposed on them pursuant to section 6673 (a)(2), but each preferred to respond to our orders in writing.

Discussion

I. Introduction

Section 6673 (a) provides for the imposition of sanctions and the award of costs in Tax Court proceedings. In pertinent part, the provision provides:

> SEC. 6673. SANCTIONS AND COSTS AWARDED BY COURTS.
>
> (a)Tax Court Proceedings. - -
>
> (1) Procedures instituted primarily for delay, etc. - - Whenever it appears to the Tax Court that - -
>
> (A) proceedings before it have been instituted or maintained by the taxpayer primarily for delay,
>
> (B) the taxpayer's position in such

> proceeding is frivolous or groundless, or
>
> (C) the taxpayer unreasonably failed to pursue available administrative remedies,

the Tax Court, in its decision, may require the taxpayer to pay to the United States a penalty not in excess of $25,000.

> (2) Counsel's liability for excessive costs. - - Whenever it appears to the Tax Court that any attorney or other person admitted to practice before the Tax Court has multiplied the proceedings in any case unreasonably and vexatiously, the Tax Court may require - -
>
> (A) that such attorney or other person pay personally the excess costs, expenses and attorney's fees reasonably incurred because of such conduct * * *

II. Section 6673 (a) (1) Liability of Petitioners

A. Positions of the Parties

Respondent's position is that we should impose a penalty against Mr. Davis in docket Nos. 146-05L (concerning Mr. Davis's 1997 and 1998 taxable years) and 147-05L (concerning his 1999 taxable year) for advancing frivolous arguments and

making groundless claims and for instituting proceedings primarily for delay. Respondent points out that Mr. Davis's 1997 and 1998 taxable years were previously before the Court in a deficiency case in which we sustained the deficiencies in full and imposed a penalty of $25,000 upon him under section 6673(a)(1) for instituting the case for purposes of delay and for making frivolous arguments. Respondent argues that, despite the imposition of one section 6673(a)(1) penalty against him, Mr. Davis has continued to institute proceedings in this Court for delay and to advance frivolous and groundless arguments therein. Respondent adds, however, that, at the Las Vegas trial session, Mr. Davis testified to certain facts that, if true, might mitigate the penalty the Court saw fit to impose on him; e.g., his reliance on counsel. Nevertheless, respondent believes that, given his history of advancing frivolous or groundless arguments, the Court should impose some penalty upon him.

Each petitioner filed a response to the Court's order to show cause. Each argues that the standard for imposition of a penalty under section 6673 is bad faith and bad faith does not encompass nonfrivolous arguments. Each catalogs both identical errors in and defenses to the settlement officer's determination that respondent may proceed with his collection actions; viz, (1) the affirmative defense of statute of limitations, (2) the imposition of double taxation, or "whipsaw", (3) an innocent spouse claim, (4) the presentation of collection alternatives, including an offer-in-compromise, (5) the settlement

officer's failure to provide requested documents, and (6) the settlement officer's failure to accord him adequate time to perfect his defense. Each argues that sanctions are not applicable to good faith efforts by taxpayers and their counsel to reach agreement with the IRS. Finally, each appears to argue that, notwithstanding the receipt of a statutory notice of deficiency, a taxpayer is entitled to raise the underlying tax liability in a section 6330 hearing.

B. Discussion

Respondent has not asked us to impose a section 6673(a)(1) penalty on Ms. Davis, in docket Nos. 144-05L and 149-05L, or on the trustee, in docket No. 145-05L, and we shall not. We shall, however, impose penalties on Mr. Davis in docket Nos. 146-05L and 147-05L. We shall do so because we believe that Mr. Davis instituted and has maintained the proceedings in those cases primarily for delay. We further believe that, in support of that goal, he raised frivolous arguments and relied on groundless positions. We have on more than one occasion during these consolidated proceedings stated our concern that petitioners had raised meritless arguments that served merely to delay the collection of tax.

We accorded Mr. Davis both a hearing and the opportunity to respond in writing to our concerns. Neither by his testimony, Ms. Osborn's testimony, nor his written responses to our orders to show cause has Mr. Davis shown us the merit of any averment,

claim, or argument advanced by him.[5] In our orders granting in part and denying part respondent's motions for summary judgment in docket Nos. 146-05L and 147-05L, we addressed each item in the catalog of errors and defenses presented in Mr. Davis's written responses, and, except with respect to the affirmative defense of the statute of limitations (with respect to which we withheld

---

5- Unsupported by any citation of authority, Mr. Davis claims that the standard for imposition of a penalty under sec. 6673(a)(1) is bad faith. In Takaba v. Commissioner, 119 T.C. 285, 294 n.2 (2002), we observed:

> There is some question whether it is necessary for a court to find that a taxpayer acted in bad faith in order to impose a penalty on him under sec. 6673(a)(1)(B) for putting forth a frivolous or a groundless position. Compare Branch v. I.R..S., 846 F.2d 36, 37 (8th Cir. 1988) ("A taxpayer's asserted good faith is not relevant to the assessment of frivolous return [sec. 6702] penalties.") with May v. Commissioner, 752 F.2d 1301, 1306 (8th Cir. 1985) ("showing of willfulness, or lack of good faith, is required [for sec. 6673(a)(1) damages]").
>
> We have not, however, required a showing of bad faith before imposing a sec. 6673(a)(1)(b) penalty, see, e.g., Bean v. Commissioner, T.C. Memo. 2006-88; Holmes v. Commissioner, T.C. Memo. 2006-80; Wetzel v. Commissioner, T.C. Memo. 2005-211, and do not believe that to be a requirement of the statute. Moreover, we believe that the Court of Appeals for the Sixth Circuit, where, barring a stipulation to the contrary, any appeal by petitioner would lie, see sec. 7482(b), would agree. See Nelson v. United States, 796 F.2d 144, 166 (6TH Cir. 1986) (good faith not a defense to imposition of sec. 6702 penalty for frivolous income tax return).

judgment), we found that he failed to raise any issue that demonstrates error or abuse of discretion on the part of the settlement officer. We incorporate herein by this reference those findings and analyses supporting them (summarized supra in our background discussion).

With respect to his affirmative defense of the statute of limitations, Mr. Davis presents only the testimony of Ms. Osborn. She testified to nothing more remarkable than that, after an assessment of tax is made, record of that assessment is posted to the IRS' computerized record system. Ms. Osborn's theory that assessment predating posting indicates something fraudulent was rejected by the Magistrate Judge in Dahmer v. United States, 90 AFTR 2d at 2002-6809, 2002-2 USTC par. 50,806 at 86,219, in a ruling that accepted the Government's position that:

> the Dahmers' evidence that the June 25, 1993[,] assessment was entered into the IRS administrative computer records in October 1993 provided no evidence of fraud because an assessment occurs on the date an authorized official signs a summary record of assessment containing the taxpayer's assessment rather than the date the assessment is posted to the IRS computerized record system. * * *

Indeed, Mr. Davis neglects even to discuss Ms. Osborn or her "cycle post date" theory in his written responses to our orders to show cause, which suggests to us that he no longer attaches any value to her testimony or theory. See Nicklaus v.

Commissioner, 117 T.C. 117, 120 n.4 (2001) (concluding that taxpayers abandoned arguments and contentions asserted prior to the fling of their brief where they failed to advance those arguments and contentions on brief). We see no merit in his affirmative defense.

Mr. Davis's inability to show the merit of any averment, claim, or argument advanced by him leads us to the conclusion that he initiated and has maintained these proceedings primarily for delay, and we so find. Indeed, he was sanctioned for just such conduct [and fined $25,000] in the proceeding that he initiated to contest respondent's determination of his underlying tax liabilities for 1997 and 1998. A taxpayer's good faith reliance on the advice of counsel is not a defense to the imposition of a penalty under section 6673(a)(1)(B). See Branch v. IRS, 846 F.2d 36, 37 (8th Cir. 1988). Nor need we excuse a taxpayer's failure to review pleadings and other documents filed on his behalf. The purpose of section 6673 is to compel taxpayers to think and to conform their conduct to settled principles before they file returns and litigate. Takaba v. Commissioner, 119 T.C. 285, 295 (2002).

Not only do we determine that Mr. Davis is deserving of a penalty for conduct that violates section 6673(a)(1)(A) and (B), but we believe that he is deserving of a penalty pursuant to section 6673(a)(1)(C) for unreasonably failing to pursue available administrative remedies. As summarized in our background discussion under the heading Determinations, Mr. Davis neither requested release

nor withdrawal of the NFTL, nor did he show that he was entitled to release or withdrawal of it. Nor did he respond to the settlement officer's request for collection alternatives. Assuming that he had a case to make to the settlement officer, Mr. Davis did not act reasonably in presenting less than his full case to him during the administrative process.

C. Conclusion

Taking into account respondent's position, we shall discharge our orders to show cause in docket Nos. 144-05L and 149-05L, involving Ms. Davis, and 145-05L, involving the trustee, as to why a penalty should not be imposed on the petitioner pursuant to section 6673(a)(1), and we shall make absolute our orders to show cause in docket Nos. 146-05L and 147-05L, involving Mr. Davis, and impose on him in each docket number a penalty pursuant to section 6673(a)(1) in the amount of $7,500.

III. Section 6673(a)(2) Liability of Counsel for Excessive Costs

A. Positions of the Parties

Respondent's position is that we should impose excess costs on Mr. Jones and Ms. Lacorte pursuant to section 6673(a)(2). Respondent argues that, on behalf of their clients, counsel made only frivolous arguments and advanced only groundless claims, and they did so knowingly or, at least, recklessly. Respondent claims that at no point in these proceedings have they shown the merit of any

argument or claim made by them on behalf of petitioners. In particular, respondent focuses on Mr. Jones's perseverance in challenging petitioners' underlying tax liabilities notwithstanding the clear language of section 6330(c)(2)(B) prohibiting such challenges to taxpayers who have received notices of deficiency and the well-defined caselaw interpreting that section. Respondent finds especially egregious Mr. Jones's challenge of Mr. Davis's underlying tax liabilities for 1997 and 1998 in docket No. 146-50L since those liabilities had been finally determined by this Court in a deficiency proceeding. Respondent notes that the motions to amend petitions were filed less than 2 months before the start of the Las Vegas trial session, and the amended petitions contain only additional claims that were all determined to be meritless by the Court. Respondent implies that counsel filed the motions only to vex respondent. Respondent argues that the lack of citation to relevant legal authorities in the oppositions to the motions for summary judgment signed by both Mr. Jones and Ms. Lacorte indicates their lack of legal research or their willful disregard of adverse authority. Respondent concludes:

> Mr. Jones' entire conduct in this case constitutes bad faith, in that he knowingly or recklessly filed petitions, motions for leave to amend petitions, amended petitions, and oppositions to respondent's summary judgment motions that raised nothing but frivolous, groundless, or statutorily precluded arguments. Ms. Lacorte's

involvement was limited to participation in the filing of motions for leave to amend petition and oppositions to respondent's summary judgment motions.

Respondent claims that he incurred excessive costs of $25,800 in litigating all of these cases and asks payment in that amount.

Alternatively, if we do not impose excess costs on Mr. Jones and Ms. Lacorte under section 6673(a)(2), respondent asks that we sanction both individuals under Rule 33(b), which sets standards in connection with counsel's signature on a pleading and provides that counsel may be sanctioned for failure to meet those standards.

Mr. Jones and Ms. Lacorte advance as their own defense that arguments made on behalf of each petitioner. They also claim errors in respondent's calculation of his costs. Mr. Jones states that, at all times relevant to these cases, Ms. Lacorte was his employee, subject to his direction and advice, and is in no way responsible for the decisions made in connection with the initiation or prosecution of these cases. Ms. Lacorte agrees that with description of her relationship to Mr. Jones.

B. Discussion

1. Introduction

We accept that Mr. Jones is principally responsible for the decisions of counsel made in these cases, and Ms. Lacorte, his employee, at all times worked under his direction and control. We shall hold only Mr. Jones financially responsible for the excessive costs we determine.

2. Requirements for an Award of Excess Costs

Section 6673(a)(2) plainly imposes three prerequisites to an award of excess costs. First, the attorney or other practitioner (without distinction, attorney) must engage in "unreasonable and vexatious" conduct. Second, that "unreasonable and vexatious" conduct must be conduct that "multiplies the proceedings." Finally, the dollar amount of the sanction must bear a financial nexus to the excess proceedings, i.e., the sanction may not exceed the "costs, expenses, and attorney's fees reasonably incurred because of such conduct." See Amlong & Amlong, P.A. v. Denny's Inc., 457 F.3d 1180, 1190 (11th Cir. 2006) (with reference to the analogous language of 26 U.S.C. sec. 1927).

3. Unreasonable and Vexatious Conduct

The purpose of section 6673(a)(2) is to penalize an attorney for his misconduct in unreasonably and vexatiously multiplying the proceedings. Congress

has not, however, specified the degree of culpability that an attorney must exhibit before we may conclude that his conduct in multiplying the proceedings is unreasonable and vexatious. See, e.g., Takaba v. Commissioner, 119 T.C. at 296-298 (2002). The language of section 6673(a)(2) is substantially identical to that of 28 U.S.C. sec. 1927 (the two provisions serving the same purpose in different forums), and we have relied on case law under the latter to ascertain the degree of culpability necessary to make an award under the former. Takaba v. Commissioner, supra at 296-297. While most of the United States Courts of Appeals have required a showing of bad faith before awarding costs under 28 U.S.C. sec. 1927, a few have required only a showing of recklessness, a lesser degree of culpability. Id. At 297. Among those few are both the Court of Appeals for the District of Columbia Circuit, see Reliance Ins. Co. v. Sweeney Corp., 792 F.2d 1137, 1138 (D.C. Cir. 1986), and the Court of Appeals for the Sixth Circuit, see Red Carpet Studios Div. of Source Advantage, Ltd. v. Sater, 465 F.3d 642, 646 (6th Cir. 2006). The venue for appeal of any award of costs imposed on Mr. Jones may be the Court of Appeals for the District of Columbia Circuit. See sec 7482(b)(1) (second sentence); Takaba v. Commissioner, supra. If not, it may be the Court of Appeals for the Sixth Circuit. See sec. 7482(b)(1)(A). The Court of Appeals for the Sixth Circuit has recently expressed the standard for awarding costs under 28 U.S.C. sec 1927 as follows: "[An attorney is sanctionable when he intentionally abuses the judicial process or knowingly disregards the risk that his actions will needlessly multiply proceedings." Red Carpet Studios

Div. of Source Advantage, Ltd. v. Sater, supra at 646. In support of that standard, the Court of Appeals cites United States v. Wallace, 964 F.2d 1214, 1220 (D.C. Cir. 1992), a case of the Court of Appeals for the District of Columbia Circuit. Id. Because we are uncertain of appellate venue, and because we find that Mr. Jones's conduct would be culpable under the standard expressed by the Court of Appeals for the Sixth Circuit (and presumably shared by the Court of Appeals for the District of Columbia Circuit), we shall for purposes of this case (and without deciding the standard in this Court), adopt that standard. See Takaba v. Commissioner, supra at 297-298.

We believe that Mr. Jones intentionally abused the judicial process by bringing and continuing these cases on behalf of petitioners knowing their claims to be without merit. In support of our determination to impose a section 6673(a)(1) penalty on Mr. Davis, we found that he initiated and maintained these proceedings primarily for delay and, in support of that goal, raised frivolous arguments and relied on groundless positions. Although we decline to impose a section 6673(a)(1) penalty on the other petitioners, given the almost cookie-cutter similarity of the claims made by each of them, we could (and do) make the same finding and reach the same conclusion with respect to each of them. None of the petitioners presents any meritorious claims. Moreover, we have no doubt that Mr. Jones has known all along that petitioners' claims lack merit. We have no doubt because of Mr. Jones's candor in responding to the orders to show cause. In those

responses, Mr. Jones admits that, while, on average, the case he brings have merit, some do not:

> The Orders to Show cannot be properly answered in the context of analysis of individual issues raised on appeal from C.P. [sec. 6330] hearings. This is true because there are some "L" [sec. 633)] case docket numbers which standing alone do not have appealable issuers]. However, in conjunction with other related "L" case docket numbers, and sometimes statutory notice of deficiency docket numbers, [they] have sufficient appealable issues, and "hazards of litigation" which justify settlement of all docket numbers before the Court[,] as agreed upon by petitioners, their counsel, and the IRS Office of Chief Counsel acting on behalf of respondent.

The five amended petitions before us today raise substantially the same issues. If Mr. Jones believed that those issues were "appealable issues", by which term we assume that he means meritorious issues, then there would be no reason for him to make his probabilistic argument; i.e., while some of my cases have no merit, some do, so that, on average, all of my cases have merit, and each is entitled to a portion of some wholesale settlement. That Mr. Jones does indeed take a wholesale approach to representing clients before this Court is supported by his request that we take notice that, during the three trial sessions of the Tax Court in Las Vegas, Nevada, between December 2004 and February 2006, Mr.

Jones and his clients settled 67 cases, agreeing to make payments of $2,564,788 with respect to $11,067,835 of claimed liabilities.[6]

The difficulty with Mr. Jones's wholesale approach, and the reason we believe that he intentionally abused the judicial process, is that, in taking that approach, Mr. Jones violated the well-known duty of any attorney before this Court to insure that there is merit to every case that he brings before the Court. That duty is imposed on Mr. Jones both by our Rules and by the ABA Model Rules of Professional Conduct (Model Rules), which, by Rule 201(a), govern his practice before this Court.[7]

In pertinent part, Rule 33(b) provides:

> (b) Effect of Signature: The signature of counsel * * * constitutes a certificate by the signer that the signer has read the pleading;

6- That Mr. Jones takes a wholesale approach in representing clients before the Court is also evidenced by the fact that he made the same probabilistic argument in Gillespie v. Commissioner, T.C. Memo. 2007-202.

7- As discussed in the text, supra, the Court of Appeals for the Sixth Circuit requires only a showing of recklessness (not a showing of subjective bad faith) before assessing monetary sanctions under 28 U.S.C. sec. 1927. Red Carpet Studios Div. of Source Advantage, Ltd. v. Sater, 465 F.3d 642, 644 (6th Cir. 2006). If Mr. Jones were to claim a lack of familiarity with our rules of practice and the ABA Model Rules of Professional Conduct, we would conclude that he acted recklessly in representing petitioners before the Court in ignorance of applicable rules.

> that, to the best of the signer's knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. * * * If a pleading is signed in violation of this Rule, the Court, upon motion or upon its own initiative, may impose upon the person who signed it * * * an appropriate sanction, which my include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, including reasonable counsel's fees.

The effect of a signature on a motion is the same as the effect of a signature on a pleading. Rule 50(a).

In pertinent part, Model Rules 3.1 states: "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."

Mr. Jones has signed pleadings and other papers to bring and defend these proceedings knowing petitioners' claims to be meritless.[8] He had done so

8 The pleadings and papers we have in mind are the petitions, motions for leave to amend petition, amended

in violation of our rules and the Model Rules and, thus, has intentionally abused the judicial process. If by that conduct he has multiplied the proceedings, he is deserving of sanctions for unreasonably and vexatiously multiplying the proceedings within the meaning of section 6673(a)(2). See Red Carpet Studios Div. Of Source Advantage, Ltd. v. Sater, supra .

4. Multiplication of the Proceedings

These proceedings should never have been brought. All of respondent's costs are, thus, in a sense, excessive. There is, however, some disagreement among the Courts of Appeals in interpreting 28 U.S.C. sec. 1927 as to whether it is only possible to multiply, or prolong, the proceedings after a case has been initiated; presumably because an attorney cannot begin to multiply the proceedings until some proceeding has come into existence for the attorney to multiply. Compare Moore v. Keegan Mgmt. Co.,78 F. 3d 431, 435 (9th Cir. 1996) (28 U.S.C. Sec. 1927 "applies only to unnecessary filings and tactics once a lawsuit has begun"), with In re TCI Ltd., 769 F. 2d 441, 448 (7th Cir. 1985) (under 28 U.S.C. Sec. 1927, trial judge "had the authority to award the fees incurred right from the beginning"). We have not addressed the analogous issue under section 6673(a)(2), and we are not compelled to do so today since, with respect to respondent's costs incurred in responding to the first pleadings (i.e., answering the petitions), there is adequate basis

---

petitions, and objections to the motions for summary judgment.

under Rule 33(b) for imposing upon Mr. Jones respondent's reasonable expenses, including reasonable counsel's fees incurred in answering those pleadings.

The text of Rule 33(b) is set forth supra. By signing a pleading, the signer certifies, among other things, that, after a reasonable inquiry, he has concluded that, to the best of his knowledge, the pleading is well grounded in fact and law. The signer must inquire into both the facts and the law at the time the pleading is filed. Versteeg v. Commissioner, 91 T.C. 339, 342 (1988). Mr. Jones does not argue that he made a reasonable inquiry that led to his erroneous conclusion that petitioners' claims had merit. Indeed, we have concluded that he signed the petitions knowing that they lacked merit. Mr. Jones signed the petitions in violation of Rule 33(b) and is deserving of a sanction on account thereof.

5. Excess Costs

Attorney's fees awarded under section 6673(a)(2) are to be computed by multiplying the number of excess hours reasonably expended on the litigation by a reasonable hourly rate. Takaba v. Commissioner, 119 T.C. at 303. The product is known as the "lodestar" amount. Id. To assist us in computing the lodestar amount, respondent has provided us with the declarations of attorneys Alan J. Tomsic and Paul C. Feinberg (Messrs. Tomsic and Feinberg, respectively, and the Tomsic and Feinberg declarations respectively). Attached to the

Tomsic declarations are copies of reports generated from respondent's internal time keeping records showing the number of hours expended on these cases by Mr. Tomsic. Although the Feinberg declaration includes the number of hours he expended on these cases, he does not provide reports similar to those provided by Mr. Tomsic, declaring that he does not keep detailed records by individual case number for time he spends in a supervisory capacity. Mr. Tomsic, explicitly, and Mr. Feinberg, by inference, calculate their time expended working on these cases from their first contacts with the cases; i.e., for Mr. Tomsic, from review of the case files leading to his drafting answers.

Respondent asks to be reimbursed for 152 hours of Mr. Tomsic's time, at $150 an hour, and for 30 hours of Mr. Feinberg's time, at $200 an hour. Respondent provides the following chart showing the allocations of hours and dollars among docket numbers.

- Hours: Alan J. Tomsic "Lodestar" amount at $150/hour (Tomsic): **144-05L** 30 hrs = $4,500; **145-05L** 20 hrs = $3,000; **146-05L** 48 hrs = $7,200; **147-05L** 24 hrs = $3,600; **149-05L** 30 hrs = $4,500; **Total**: 152 hrs = $22,800;

- Hours: Paul C. Feinberg "Lodestar" amount at $200/ hour (Feinberg): **144-05L** 3 hrs = $600; **145-05L** 2 hrs = $400; **146-05L** 5 hrs = $1,000; **147-05L** 2 hrs = $400; **149-05L** 3 hrs = $600; **Total**: 15 hrs = $3,000;

- "Lodestar" amount Totals: **144-05L** $5,100; **145-05L** $3,400; **146-05L** $8,200; **147-05L** $4,000; **149-05L** $5,100; **Total**: $25,800;

Mr. Tomsic is the attorney with day-to-day responsibility for these cases. He is an attorney employed in the IRS Office of Chief Counsel in Las Vegas, Nevada. He has been a member of one or more State bars since 1981. He is admitted to practice before the United States Tax Court. His declaration contains the following chart showing the hours he spent on these cases.

- Hours: Review case files and answer peittion: **144-05L** 3 hrs; **145-05L** 3 hrs; **146-05L** 3 hrs; **147-05L** 3 hrs; **149-05L** 3 hrs; **Total**: 15 hrs;

- Hours: Request information and perform research: **144-05L** 5 hrs; **145-05L** 1 hr; **146-05L** 1 hr; **147-05L** 2 hrs; **149-05L** 1 hr; **Total**: 10 hrs;

- Hours: Objections to motions for leave to amend: **144-05L** 2 hrs; **145-05L** 2 hrs; **146-05L** 2 hrs; **147-05L** 2 hrs; **149-05L** 2 hrs; **Total**: 10 hrs;

- Hours: Motions for summary judgment: **144-05L** 6 hrs; **145-05L** 5 hrs; **146-05L** 20 hrs; **147-05L** 4 hrs; **149-05L** 15 hrs; **Total**: 50 hrs;

- Hours: Answer amended petitions: **144-05L** 2 hrs; **145-05L** 2 hrs; **146-05L** 2 hrs; **147-05L** 2 hrs; **149-05L** 2 hrs; **Total**: 10 hrs;

- Hours: Review info and prepare settlement documents: **144-05L** 4 hrs; **145-05L** 0 hrs; **146-05L** 12 hrs; **147-05L** 4 hrs; **149-05L** 0 hrs; **Total**: 20 hrs;

- Hours: Prepare for and attend Las vegas trial session: **144-05L** 8 hrs; **145-05L** 7 hrs; **146-05L** 8 hrs; **147-05L** 7 hrs; **149-05L** 7 hrs; **Total**: 37 hrs;

- Total hours: **144-05L** 30 hrs; **145-05L** 20 hrs; **146-05L** 48 hrs; **147-05L** 24 hrs; **149-05L** 30 hrs; **Total**: 152 hrs;

Mr. Feinberg is an Associate Area Counsel in the IRS Office of Chief Counsel in Las Vegas, Nevada. He has been in that position since September 2002 and has been employed by the Chief Counsel since July 1991. He has been a member of one or more State bars since 1979. He is admitted to practice before the United States Tax Court. His responsibilities include, among other things, supervising the litigation of cases before the Court. In connection with these cases, he supervised the activities of Mr. Tomsic, and, as supervisor, he familiarized himself with the cases, discussed handling of the cases and issues presented, reviewed all documents that were prepared for filing with the Court, and attended all proceedings concerning the cases at the Las Vegas trial session. He estimates that he spent a total of 15 hours on these cases.

Respondent claims that it is reasonable to utilize hourly charges of $150 and $200 for Messrs. Tomsic's and Feinberg's time, respectively, in computing the lodestar amounts for these cases. Respondent argues that those are the same rates that were allowed by the Court for the Commissioner's trial and supervisory attorneys in 2002, in Takaba v. Commissioner, 119 T.C. at 304-305 (2002).

Mr. Jones does not question the reasonableness of the hourly rates claimed for either Mr. Tomsic or Mr. Feinberg. Mr. Jones has principally two objections to the award of excess costs. First, he objects to respondent's claim that all of the hours expended by his attorneys are excessive and deserving of compensation. Second, he claims that respondent fails to describe and substantiate the nature of the services rendered by his attorneys.

We see no merit to either of Mr. Jones's objections. As we have made plain, these cases are without merit and never should have been brought. By their declarations, Messrs. Tomsic and Feinberg describe adequately their activities with respect to these cases. Mr. Tomsic's declaration is accompanied by computer records that, we assume, were made contemporaneously with the work performed, and that support his claim. Moreover, we are familiar with the procedural and factual history of these cases, and we believe that 152 hours was reasonably necessary for Mr. Tomsic to do the work he described. We find that $150 is a reasonable hourly charge for Mr. Tomsic's time, and he reasonably expended 152 hours on this litigation.

The lodestar amount for Mr. Tomsic, is, thus, $22,800. We accept at face Mr. Feinberg's descriptions of his duty and activities and find reasonable his claim that he spent 15 hours in those activities. We find that $200 is a reasonable hourly charge for Mr. Feinberg's time, and he reasonably expended 15 hours on this litigation. The lodestar amount for Mr. Feinberg is, thus, $3,000.

The total lodestar amount for the time of Messrs. Tomsic and Feinberg is $25,800. Respondent has not itemized costs for travel expense, photocopying, or supplies used in preparing the cases. Respondent limits his request for costs to the total lodestar amount. We shall require Mr. Jones to pay costs in that amount.

C. Conclusion

We find that $25,800 is a reasonable amount for respondent's excess attorney's fees incurred by reason of Mr. Jones's unreasonable and vexatious multiplication of these proceedings. Therefore, we shall make the orders to show cause absolute and order Mr. Jones personally to pay $5,100, $3,400, $8,200, $4,000, and $5,100 in docket Nos. 144-05L, 145-05L,146-05L,147-05L,and149-05L, respectively, pursuant to section 6673(a)(2). [9]

IV. Conclusion

9-Alternatively, with respect to respondent's attorney's fees allocated to reviewing case files and answering petition, we make the award pursuant to Rule 33 (b), as discussed supra .

To reflect the foregoing,

An appropriate order will be issued, and an order and decision will be entered in each docket.

UNITED STATES TAX COURT
Washington, DC 20217

Laura K. Davis, *et al.*,	)	
Petitioners,	)	Docket Nos.
v.	)	144-05L,
	)	145-05L,
Commissioner of	)	146-05L,
Internal Revenue,	)	147-05L,
Respondent.	)	149-05L.

ORDER

These cases were called from the calendar for the Trial Session of the Court at Las Vegas, Nevada on February 28, 2006, for hearing at Docket No. 145-05L on so much of the Court's Order dated February 17, 2006, as directed petitioners and counsel for petitioners to show cause why penalties and excessive costs under I.R.C. §6673 should not be imposed upon them, and for hearing regarding the imposition of penalties or excessive costs on petitioners and counsel for petitioners at Docket Nos. 144-05L, 146-05L, 147-05L, and 149-05L. The Court directed that the Stipulated Decision documents lodged with the Court on February 15, 2006 shall be filed as Stipulations of Settlement as of the date of this Order. After due consideration, and for cause more fully appearing in the transcript of the proceedings, it is

ORDERED that so much of the Court's Orders dated February 17, 2006, as granted respondent's Motions for Summary Judgment, in whole or in part,

in the above-referenced docket numbers, are hereby vacated. It is further

ORDERED that respondent shall file a response with the Court on or before March 30, 2006, setting forth the legal fees and costs incurred by respondent as set forth in the transcript of the proceedings. It is further

ORDERED that, on or before May 1, 2006, each petitioner shall show cause in writing why, in each case in which the petitioner is involved, a penalty should not be imposed on the petitioner pursuant to section 6673(a)(1). It is further

ORDERED that, on or before May 1, 2006, counsel of record in each case shall show cause in writing why, in each case, excessive costs should not be imposed on each counsel pursuant to section 6673(a)(2). It is further

ORDERED that, on or before May 1, 2006, respondent shall inform the Court in writing of his positions with respect to the penalties and excessive costs described in the two immediately preceding order paragraphs. It is further

ORDERED that jurisdiction is retained by this Division of the Court.

(signed) James S. Halpern
James S. Halpern, Judge

Dated: Las Vegas, Nevada
February 28, 2006

UNITED STATES TAX COURT
Washington, DC 20217

Laura K. Davis, Petitioner,	)	
v.	)	Docket No. 144-05L
Commissioner of Internal Revenue, Respondent.	)	

ORDER

Pursuant to the determination of this Court as set forth in its Memorandum Opinion (T.C. Memo. 2007-201), filed July 24, 2007 it is

ORDERED that so much of the Court's Order, dated February 28, 2006, directed to Maria Angelisa L. Lacorte is hereby discharged. It is further

ORDERED that so much of the Court's Order, dated February 28, 2006, directing petitioner's counsel, Robert Alan Jones, to show cause why the Court should not impose on him a penalty pursuant to section 6673(a)(2) is hereby made absolute, in that Robert Alan Jones shall pay to the United States a penalty in the amount of $5,100.00. It is Further

ORDERED that in addition to usual service on the parties, the Clerk of the Court shall serve a copy of this Order on each of petitioner's counsel Robert Alan

Jones and Maria Angelisa L. Lacorte at their address of record in this case.

(signed) James S. Halpern
James S. Halpern, Judge

Dated: Washington, D.C.
July 25, 2007

UNITED STATES TAX COURT
Washington, DC 20217

JLD Asset Management Company, a/k/a JLD Asset Management Trust, Jeffrey Davis, Trustee, Petitioner,	)	
v.	)	Docket No. 145-05L
Commissioner of Internal Revenue, Respondent.	)	

ORDER

Pursuant to the determination of this Court as set forth in its Memorandum Opinion (T.C. Memo. 2007-201), filed July 24, 2007 it is

ORDERED that so much of the Court's Order, dated February 28, 2006, directed to Maria Angelisa L. Lacorte is hereby discharged. It is further

ORDERED that so much of the Court's Order, dated February 28, 2006, directing petitioner's counsel to show cause why the Court should not impose on him a penalty pursuant to section 6673(a)(2) is hereby made absolute, in that Robert Alan Jones shall pay to the United States a penalty in the amount of $3,400.00.

ORDERED that in addition to usual service on the parties, the Clerk of the Court shall serve a copy of this Order on each of petitioner's counsel Robert Alan

Jones and Maria Angelisa L. Lacorte at their address of record in this case.

(signed) James S. Halpern
James S. Halpern, Judge

Dated: Washington, D.C.
July 25, 2007

UNITED STATES TAX COURT
Washington, DC 20217

Jeffrey W. Davis, Petitioner,	)	
v.	)	Docket No. 146-05L
Commissioner of Internal Revenue, Respondent.	)	

ORDER

Pursuant to the determination of this Court as set forth in its Memorandum Opinion (T.C. Memo. 2007-201), filed July 24, 2007 it is

ORDERED that so much of the Court's Order, dated February 28, 2006, directed to Maria Angelisa L. Lacorte is hereby discharged. It is further

ORDERED that so much of the Court's Order, dated February 28, 2006, directing petitioner's counsel to show cause why the Court should not impose on him a penalty pursuant to section 6673(a)(2) is hereby made absolute, in that Robert Alan Jones shall pay to the United States a penalty in the amount of $8,200.00.

ORDERED that in addition to usual service on the parties, the Clerk of the Court shall serve a copy of this Order on each of petitioner's counsel Robert Alan

Jones and Maria Angelisa L. Lacorte at their address of record in this case.

(signed) James S. Halpern
James S. Halpern, Judge

Dated: Washington, D.C.
July 25, 2007

UNITED STATES TAX COURT
Washington, DC 20217

Jeffrey W. Davis, Petitioner,	)	
v.	)	Docket No. 147-05L
Commissioner of Internal Revenue, Respondent.	)	

ORDER

Pursuant to the determination of this Court as set forth in its Memorandum Opinion (T.C. Memo. 2007-201), filed July 24, 2007 it is

ORDERED that so much of the Court's Order, dated February 28, 2006, directed to Maria Angelisa L. Lacorte is hereby discharged. It is further

ORDERED that so much of the Court's Order, dated February 28, 2006, directing petitioner's counsel to show cause why the Court should not impose on him a penalty pursuant to section 6673(a)(2) is hereby made absolute, in that Robert Alan Jones shall pay to the United States a penalty in the amount of $4,000.00.

ORDERED that in addition to usual service on the parties, the Clerk of the Court shall serve a copy of this Order on each of petitioner's counsel Robert Alan

Jones and Maria Angelisa L. Lacorte at their address of record in this case.

(signed) James S. Halpern
James S. Halpern, Judge

Dated: Washington, D.C.
July 25, 2007

UNITED STATES TAX COURT
Washington, DC 20217

Laura K. Davis, Petitioner,	)	
v.	)	Docket No. 149-05L
Commissioner of Internal Revenue, Respondent.	)	

ORDER

Pursuant to the determination of this Court as set forth in its Memorandum Opinion (T.C. Memo. 2007-201), filed July 24, 2007 it is

ORDERED that so much of the Court's Order, dated February 28, 2006, directed to Maria Angelisa L. Lacorte is hereby discharged. It is further

ORDERED that so much of the Court's Order, dated February 28, 2006, directing petitioner's counsel to show cause why the Court should not impose on him a penalty pursuant to section 6673(a)(2) is hereby made absolute, in that Robert Alan Jones shall pay to the United States a penalty in the amount of $5,100.00.

ORDERED that in addition to usual service on the parties, the Clerk of the Court shall serve a copy of this Order on each of petitioner's counsel Robert Alan

Jones and Maria Angelisa L. Lacorte at their address of record in this case.

(signed) James S. Halpern
James S. Halpern, Judge

Dated: Washington, D.C.
July 25, 2007

UNITED STATES TAX COURT
Washington, DC 20217

Laura K. Davis, Petitioner,	)	
v.	)	
	)	Docket No.
Commissioner of Internal Revenue, Respondent.	)	144-05L

ORDER AND DECISION

Pursuant to the determination of this Court as set forth in its Memorandum Opinion (T.C. Memo. 2007-201), filed July 24, 2007 it is

ORDERED that respondent's motion for summary judgment, filed January 12, 2006, is hereby denied. It is further

ORDERED that so much of the Court's Order, dated February 28, 2006, directing petitioner to show cause why the Court should not impose on her a penalty pursuant to section 6673(a)(1) is hereby discharged. It is further

ORDERED AND DECIDED that respondent may proceed with the collection action for the taxable year 1999, as determined in the Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330, dated December 2, 2004, upon which this

case is based and the stipulation of settlement filed with the Court on February 20, 2006.

(signed) James S. Halpern
James S. Halpern, Judge

Dated: Washington, D.C.
July 27, 2007

UNITED STATES TAX COURT
Washington, DC 20217

JLD Asset Management Company, a/k/a JLD Asset Management Trust, Jeffrey Davis, Trustee, Petitioner,	)	
v.	)	Docket No. 145-05L
Commissioner of Internal Revenue, Respondent.	)	

ORDER AND DECISION

Pursuant to the determination of this Court as set forth in its Memorandum Opinion (T.C. Memo. 2007-201), filed July 24, 2007 it is

ORDERED that respondent's motion for summary judgment, filed January 12, 2006, is hereby denied. It is further

ORDERED that so much of the Court's Order, dated February 28, 2006, directing petitioner to show cause why the Court should not impose on petitioner a penalty pursuant to section 6673(a)(1) is hereby discharged. It is further

ORDERED AND DECIDED that respondent may proceed with the collection action for the taxable year 1999, as determined in the Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330, dated December 2, 2004, upon which this

case is based and the stipulation of settlement filed with the Court on February 28, 2006.

(signed) James S. Halpern
James S. Halpern, Judge

Dated: Washington, D.C.
July 27, 2007

UNITED STATES TAX COURT
Washington, DC 20217

Jeffrey Davis,	)	
Petitioner,	)	
v.	)	Docket No.
	)	146-05L
Commissioner of Internal Revenue,	)	
Respondent.	)	

ORDER AND DECISION

Pursuant to the determination of this Court as set forth in its Memorandum Opinion (T.C. Memo. 2007-201), filed July 24, 2007 it is

ORDERED that respondent's motion for summary judgment, filed January 5, 2006, is hereby denied. It is further

ORDERED that so much of the Court's Order, dated February 28, 2006, directing petitioner to show cause why the Court should not impose on him a penalty pursuant to section 6673(a)(1) is hereby made absolute, in that petitioner shall pay to the United States a penalty in the amount of $7,500. It is further

ORDERED AND DECIDED that respondent may proceed with the collection action for the taxable years 1997 and 1998, as determined in the Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330, dated December 2, 2004, upon which this case is based and the stipulation of settlement filed with the Court on February 28, 2006.

(signed) James S. Halpern
James S. Halpern, Judge

Dated: Washington, D.C.
July 27, 2007

UNITED STATES TAX COURT
Washington, DC 20217

Jeffrey Davis, Petitioner,	)	
v.	)	Docket No. 147-05L
Commissioner of Internal Revenue, Respondent.	)	

ORDER AND DECISION

Pursuant to the determination of this Court as set forth in its Memorandum Opinion (T.C. Memo. 2007-201), filed July 24, 2007 it is

ORDERED that respondent's motion for summary judgment, filed January 12, 2006, is hereby denied. It is further

ORDERED that so much of the Court's Order, dated February 28, 2006, directing petitioner to show cause why the Court should not impose on him a penalty pursuant to section 6673(a)(1) is hereby made absolute, in that petitioner shall pay to the United States a penalty in the amount of $7,500. It is further

ORDERED AND DECIDED that respondent may proceed with the collection action for the taxable year 1999, as determined in the Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330, dated December 2, 2004, upon which this

case is based and the stipulation of settlement filed with the Court on February 28, 2006.

(signed) James S. Halpern
James S. Halpern, Judge

Dated: Washington, D.C.
July 27, 2007

UNITED STATES TAX COURT
Washington, DC 20217

Laura K. Davis, Petitioner,	)	
v.	)	Docket No. 149-05L
Commissioner of Internal Revenue, Respondent.	)	

ORDER AND DECISION

Pursuant to the determination of this Court as set forth in its Memorandum Opinion (T.C. Memo. 2007-201), filed July 24, 2007 it is

ORDERED that respondent's motion for summary judgment, filed January 5, 2006, is hereby denied. It is further

ORDERED that so much of the Court's Order, dated February 28, 2006, directing petitioner to show cause why the Court should not impose on her a penalty pursuant to section 6673(a)(1) is hereby discharged. It is further

ORDERED AND DECIDED that respondent may proceed with the collection action for the taxable years 1997 and 1998, as determined in the Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330, dated December 2, 2004, upon which this case is based and the stipulation of settlement filed with the Court on February 28, 2006.

(signed) James S. Halpern
James S. Halpern, Judge

Dated: Washington, D.C.
July 27, 2007

TRANSCRIPT EXCERPTS FROM HEARING OF FEBRUARY 28, 2006

1. **Page 13, line 14 thru Page 14, Line 20: (By the Court)**

THE COURT: Okay, but let me just emphasize what the Court's focus is here. The Court's focus here is on the documents that we filed to initiate the proceeding in the docket numbers that are now before us which include the petition, the amended petition, the response – excuse me, the petition, the motion for leave to amend the petition, the amended petition, the response to the Motions for Summary Judgment. The Court is concerned that the grounds set forth in the petition and in the amended petition and the objections made to the Motion for Summary Judgment are groundless or without any support.

And as to what these taxpayers did before the petitions were filed in this case, that is not a direct focus to the Court. The Court notes from the documents that every petition was signed by you and it was your counsel, I suspect, to these clients that caused them to file these petitions, to authorize you to make a motion for leave to amend the petition, and to authorize you to file the petitions. The Court's concentration is on the grounds set forth and whether those grounds with respect to the taxpayers, whether the proceeding has been instituted or maintained primarily for delay, whether the taxpayers position is frivolous or groundless and whether they failed to pursue administrative remedies, all with respect to what happened

subsequent to receiving the notices of determination by the Respondent's settlement officers in this various case.

And with respect to you the focus of the Court is only on the documents that you signed and the actions that Respondent took in response to those documents and whether those actions on our part were unreasonable and vexatious in causing work for the Respondent. The is the focus. Be aware of that.

2. **Page 15, lines 17 thru 23 (By The Court)**

THE COURT: I would just clarify one more time that the Court's focus is on the language of the petition, the language of the amended petition, the language of the objection and the merit of the claims made therein and whether those claims have merit or are groundless or were groundless or were instituted solely for delay. The Court is not concerned with anything beyond the specific claims made.

3. **Page 23, lines 6 thru 25 (J. Davis Direct by Mr. Jones)**

Q. And is it your understanding that with respect to all of the docket numbers that are before the Court today involving either you or your wife that an agreement has been reached to settle that with the Government?

A. Yes, that is correct, and that is my understanding. And I agreed to that per our

conversations and am fully, you know, prepared to get that taken care of and gone.

Q. And what is that settlement based on as far as filing tax returns or amending tax returns, to your knowledge?

A. My knowledge was that, you know, amended, I don't know if amended returns was the correct word, but amended, you know, numbers were given, you know, to the IRS Counsel and to the IRS itself and agreed upon the correct tax that was owed for those years as well as interest and penalties. So the dollar amount that I was given included tax, interest and penalties.

Q. And you are willing to made that settlement?

A. Yes, correct.

4. **Page 28, line 9 thru Page 29, line 4 (J. Davis Cross) (By Mr. Tomsic)**

And so what I would like to know is why did you engage Mr. Jones to file the petitions in these cases? Or perhaps he advised you to file them? What was the circumstance that gave rise to the actions that are before this Court today, the request that you made to review the Appeals Office's notices of determination? Why are we here?

THE WITNESS: Well, in simple to answer why we're here, I'm at a loss as to why we're here

because, you know, my understanding was that these cases were settled. I have come here from Ohio under, you know, short notice. I didn't find out about this till Thursday. Had to get a flight, and you know, come out here and, you know, obviously disrupt my, you know, my business and so forth.?

To get back, Your Honor, to what you mentioned about the defense of the whipsaw and so forth, I mean those were legitimate, you know, issues because the Asset Management, you know the Asset Management and me personally cannot be, cannot – income cannot be counted toward each of us and both taxed. And that's all, as I understand it, what the whipsaw is all about. I don't know the, you know, the details of it.

5. **Page 46. Line 22 thru Page 47, line 22 (Osborn Direct) (By Mr. Jones)**

A. - - taxpayer's account. I found two assessments, one for Mrs. Davis and one for Mr. Davis. The one for Mrs. Davis appeared to be made from the Tax Court Decision, It was the same amount. But they were made at very different times.

Q. What did you find with respect to the timeliness of the assessment from the records, and what did you do with our findings?

A. I found that the timeliness varied depending on the year and whether it's Mrs. Davis or Mr. Davis. I found and I gave you my thoughts, my opinions of

the complication that I saw existed in the case in order to solve it.

Q. What was your conclusion that you gave me with respect to whether or not the assessment were time barred?

A. The assessments made from the Tax Court decision in the first '97 and '98, in the Tax Court decision that resulted from Mr. Gross' representation, that those had a procedural problem following the Tax Court decision.

They contained inappropriate accounting transactions, the methods that they were assessed.

Q. You didn't answer my question. My question was did you find that in your opinion they were time barred or not? We're not trying that issue.

A. Yes, I did find that they were time barred.

Q. Did you tell me that?

A. Yes, I did tell you that.

6. **Page 83, Line 16-19 (Examination by the Court)**

___Mr. Jones, come on back up here. The Court would be willing to vacate its order with respect to the summary judgment and treat the decision documents that have been lodged as a stipulated settlement if the parties wished.